Supreme Court of the United States

OCTOBER TERM, 1969

No. 1089

WILLIE E. WILLIAMS, *Appellant*,

vs.

ILLINOIS

APPEAL FROM THE SUPREME COURT OF ILLINOIS

INDEX

THE UNITED STATES OF AMERICA

IN THE CIRCUIT COURT OF COOK COUNTY,
ILLINOIS, MUNICIPAL DEPARTMENT,
FOURTH DISTRICT

State of Illinois)
) ss.
County of Cook)

Pleas, Proceedings and Judgments, before The Municipal Court of Chicago, Fourth Municipal District of The Circuit Court of Cook County, Illinois, held in the City of Maywood in the County of Cook and State of Illinois, at the places in said city provided by the corporate authorities of said city for the holding of said Court, in the year of our Lord, one thousand nine hundred and sixty seven and the Independence of the United States, the one hundred and ninety second.

Present: Honorable Joseph R. Gill, One of the Magistrates of the court.

JOHN J. STAMOS,
State's Attorney

JOSEPH I. WOODS,
Sheriff

Attest:

JOSEPH J. McDONOUGH,
Clerk

Be it Remembered, to wit: that on November 29th, 1967, the following among other proceedings were had in said court and entered of record therein, to-wit:

THE PEOPLE OF THE STATE OF ILLINOIS

v.

WILLIE E. WILLIAMS

No. 67 MC4 53645 Criminal

11 (Court Branch)

IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS, PLAINTIFF

v.

WILLIE E. WILLIAMS, DEFENDANT

COMPLAINT—Filed June 24, 1967

Edna Whitney, 219 No. 2nd Ave., Maywood, Ill., complainant, now appears before The Circuit Court of Cook County and in the name and by the authority of the People of the State of Illinois states that Willie E. Williams has, on or about June 24, 1967 at Rear of 219 No. 2nd Ave., Maywood, Ill. committed the offense of Theft in that he knowingly obtained unauthorized control over credit cards, checks and papers of the value of less than one hundred and fifty dollars, the property of Edna Whitney, intending to deprive the said Edna Whitney permanently of the use and benefits of said property, in violation of Chapter 38, Section 16-1a1, Illinois Revised Statute and Against the Peace and Dignity of the People of the State of Illinois.

/s/ Edna L. Whitney
(Complainant's Signature)

219 No. 2nd Ave.
(Complainant's Address)

FI 4-0341
(Telephone No.)

State of Illinois)
) ss.
County of Cook)

EDNA WHITNEY
(Complainant's Signature)

being first duly sworn, on Her oath, deposes and says that he has read the foregoing complaint by him and subscribed that the same is true.

/s/ Edna L. Whitney

Subscribed and sworn to before me June 24, 1967.

/s/ Joseph J. McDonough
Clerk
Dep. /s/ Illegible

I have examined the above complaint and the person presenting the same and have heard evidence thereon, and am satisfied that there is probably cause for filing same. Leave is given to file said complaint. Warrant issued.

Bail Fixed at $ _____

Judge

11 (Court Branch)

IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS

67 MC4 53645

STATE OF ILLINOIS, PLAINTIFF

v.

WILLIE E. WILLIAMS, DEFENDANT

ARREST WARRANT—Issued June 24, 1967

The People of the State of Illinois to all Peace Officers in the State—Greeting:

We command you to arrest Willie E. Williams, 1219 So. Damen, Chicago, Illinois for the offense of Theft stated in a charge now pending before this court and that you bring him instanter before The Circuit Court of Cook County at 125 So. 5th Ave., Maywood, Illinois or if I am absent or unable to act before the nearest or most accessible court in Cook County or if this warrant is executed in a county other than Cook, before the nearest or most accessible judge in the county where the arrest is made.

Issued in Cook County _____, 19____.

Bail fixed at $2,000.

/s/ Harry A. Schrier
Judge

Witness: Joseph J. McDonough, Clerk of the Court and the Seal thereof, at Chicago, June 24, 1967.

/s/ Joseph J. McDonough
Clerk
Dep. /s/ Illegible

IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS

BE IT REMEMBERED, that afterwards, to wit: on August 14th, 1967, the following among other proceedings were had and entered of record in said court which proceedings were and are in words and figures following to-wit:

Present Honorable Norman A. Korfist, One of the judges of the court.

JOHN J. STAMOS
States Attorney

JOSEPH P. WOODS
Sheriff

JOSEPH J. MCDONOUGH
Clerk

No. 67 MC 4-53645 Criminal

THE PEOPLE OF THE STATE OF ILLINOIS

v.

WILLIE E. WILLIAMS

Now comes EDNA WHITNEY and in the name of the People of the State of Illinois, presents to the Court the complaint herein under oath, and moves the Court that leave be granted to file said complaint, and the Court having examined said complaint, and having examined under oath, the person presenting the same, and having heard the evidence thereon, and being satisfied that there is probable cause for filing the same, it is ordered that leave be granted to file said complaint instanter.

It appearing to the Court that the offense described in the complaint has been committed and it appearing to the Court that the defendant was arrested without process and is now here present in open Court, the Court takes jurisdiction of the person of said defendant, and the Sheriff of this Court is ordered forthwith to take the

body of said defendant into his custody and said defendant safely keep so that said Sheriff may have said defendant before the Court to answer to said people for and concerning the offense charged in said complaint and this order shall be sufficient warrant of said Sheriff for so doing.

Bond set at TWO THOUSAND DOLLARS ($2,000.00).

It is further ordered by the Court that this cause be and the same is hereby postponed to AUGUST 16th, 1967, in Branch 11.

IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS

BE IT REMEMBERED, that afterwards, to wit: on August 16th, 1967, the following among other proceedings were had and entered of record in said court which proceedings were and are in words and figures following to-wit:

Present Honorable Harry A. Schrier, One of the Magistrates of the court.

JOHN J. STAMOS
States Attorney

JOSEPH I. WOODS
Sheriff

JOSEPH J. McDONOUGH
Clerk

No. 67 MC4 53645 Criminal

THE PEOPLE OF THE STATE OF ILLINOIS

v.

WILLIE E. WILLIAMS

Now come the people by the State's Attorney and the defendant as well in his own proper person also comes and thereupon on motion of the State, it is ordered by the Court that this cause be and the same is hereby postponed to SEPTEMBER 6th, 1967.

IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS

BE IT REMEMBERED, that afterwards, to wit: on September 6th, 1967, the following among other proceedings were had and entered of record in said court which proceedings were and are in words and figures following to-wit:

Present Honorable Joseph R. Gill, One of the Magistrates of the court.

JOHN J. STAMOS
States Attorney

JOSEPH I. WOODS
Sheriff

JOSEPH J. MCDONOUGH
Clerk

No. 67 MC 4 53645 Criminal

THE PEOPLE OF THE STATE OF ILLINOIS

v.

WILLIE E. WILLIAMS

Now come the people by the State's Attorney and the defendant as well in his own proper person and said defendant being forthwith demanded of and concerning the charge alleged against him in the complaint herein how he will acquit himself for a plea in that behalf says that he is not guilty in manner and form as charged in said complaint.

Said defendant being duly advised by the Court as to his right to a trial by jury in this cause, elects to waive a trial by jury and this cause is by agreement in open Court between the parties hereto, submitted to the Court for trial without a jury.

The people being now here represented by the State's Attorney and said defendant being present in his own proper person and the trial of this cause is now here en-

tered upon before the Court without a jury and the Court, after hearing all the testimony of the witnesses and the arguments of counsel, and being fully advised in the premises, renders the following finding, to-wit:

"THE COURT FINDS THE DEFENDANT GUILTY IN MANNER AND FORM AS CHARGED IN THE COMPLAINT HEREIN. WHEREFORE IT IS ORDERED THAT THE SAME BE ENTERED OF RECORD HEREIN".

The State's Attorney now here moves the Court for final judgment on the finding of guilty herein, said people being represented here by the State's Attorney and said defendant being present in his own proper person and not saying anything further why the judgment of the Court should not now be pronounced against him on the finding of guilty entered in this cause, the Court finds that it has jurisdiction of the subject matter of this cause and of the parties hereto, and it is considered and adjudged by the Court that said defendant is guilty of the criminal offense as described in the complaint, on said finding of guilty.

It is therefore considered, ordered and adjudged that said defendant, because of said finding of guilty, be and he is hereby sentenced to confinement in the County Jail of Cook County, for the term of ONE (1) YEAR from and after the delivery of the body of said defendant to the jailer of said County and it is further considered, ordered and adjudged that said defendant, because of said finding of guilty, be further sentenced to pay to the Clerk of this Court, to be by said Clerk disposed of according to law, a fine in the sum of FIVE HUNDRED DOLLARS ($500.00) and also the costs of this suit taxed at FIVE DOLLARS ($5.00) and in default of payment of said fine, it is ordered that said defendant, after the expiration of said term of imprisonment, stand committed in said County Jail until said fine and costs shall have been paid or until said defendant shall have been discharged according to law. And the Sheriff of this Court is hereby commanded to take the body of said defendant from the bar of this Court and deliver said body

to the keeper of said jail, and the keeper of said jail is hereby commanded to receive the body of said defendant into his custody and confine said body in said County Jail in safe and secure custody for and during said term as aforesaid, and after the end of said term of imprisonment, the keeper of said jail is hereby commanded to continue to confine the body of said defendant in said County Jail in safe and secure custody until said fine shall have been paid or until said defendant shall have been discharged according to law, and after the expiration of said fixed term of imprisonment as aforesaid and after said fine and costs shall have been paid as aforesaid, said defendant shall be thereafter discharged.

It is further ordered that execution issue herein against said defendant for the amount of said fine.

IN THE CIRCUIT COURT OF COOK COUNTY
FOURTH MUNICIPAL DISTRICT—
CRIMINAL DIVISION

67 MC4-53645

Received Criminal Court Bldg. Nov. 27, 1967
John J. Stamos, States Attorney

PEOPLE OF THE STATE OF ILLINOIS

vs.

WILLIE E. WILLIAMS

NOTICE OF MOTION—Filed November 29, 1967

To: John J. Stamos
State's Attorney of Cook County
2600 South California Avenue
Chicago, Illinois 60608

PLEASE TAKE NOTICE that on Wednesday, November 29, 1967, at 9:30 A.M., or as soon thereafter as counsel can be heard, I shall appear before the Presiding Judge of the Fourth Municipal District in Oak Park, Illinois, and then and there present the attached Petition.

/s/ Stanley A. Bass
Attorney For Defendant
Civil Legal Aid Service
Cook County Jail
Chicago, Illinois 60608
523-0101 ext. 30

Dated: November 27, 1967

IN THE CIRCUIT COURT OF COOK COUNTY
FOURTH MUNICIPAL DISTRICT—
CRIMINAL DIVISION

67 MC4-53645

PEOPLE OF THE STATE OF ILLINOIS

vs.

WILLIE E. WILLIAMS

PETITION—Filed November 29, 1967

Defendant, WILLIE E. WILLIAMS, by his attorneys, Stanley A. Bass and Melvin B. Goldberg, Civil Legal Aid Service, Cook County Jail, respectfully submits his Petition, pursuant to Section 72 of the Illinois Civil Practice Act and Section 180-6 of Chapter 38, Ill. Rev. Stat., to vacate that portion of the Court's order of September 6, 1967, which directs that defendant stand committed to Cook County Jail in default of payment of $505 fine and costs.

In support of this Petition, defendant states:

1. Defendant WILLIE E. WILLIAMS is an indigent inmate of the Cook County Jail in Chicago, Illinois.

2. Defendant has no estate, funds, or valuable property whatsoever, and he is represented herein by legal aid counsel furnished without cost to him.

3. On August 13, 1967, defendant was arrested for petty theft, and on the following day he was brought before the Fourth Municipal District of the Circuit Court of Cook County for arraignment. Bail was set at $2,000. The Court continued the case to August 16, 1967, and committed defendant to Cook County Jail for failure to provide bail.

4. On August 16, 1967, on motion of the State's Attorney, the case was continued to September 6, 1967. Defendant remained in custody.

5. On September 6, 1967, defendant was tried by the Honorable Joseph R. Gill, sitting without a jury.

The Court found defendant guilty as charged of petty theft, and sentenced him to one year imprisonment in Cook County Jail. The Court further imposed a $500 fine and $5 costs, and directed that, in default of payment of same, defendant should stand committed to jail to satisfy the unpaid fine and costs at the rate of $5 per day.

6. Defendant was not represented by counsel at trial, and he was financially unable to obtain counsel. The Court did not advise defendant of his right to have assistance of counsel at trial, or of his right to appointment of counsel, if he is indigent. Defendant did not knowingly and intentionally waive his right to assistance of counsel for his defense.

7. At the time of the imposition of sentence, it should have been apparent to the Court that defendant was financially unable to pay the $505 fine and costs, since he was unable to post $200 as 10% bail bond deposit, he was unable to earn wages since his incarceration on August 13, 1967, and he was financially unable to hire an attorney.

8. Since September 6, 1967 and continuing through the present time, defendant is, and has been, without funds to pay the fine and court costs.

9. Defendant will be able to get a job and earn funds to pay the fine and costs, if he is released from jail upon expiration of his one year sentence.

10. At all times relevant herein, Chapter 38, Section 180-6, Ill. Rev. Stat., provided:

> Whenever it shall be made satisfactorily to appear to the court, after all legal means have been exhausted, that any person who is confined in jail for any fine or costs of prosecution, for any criminal offense, hath no estate wherewith to pay such fine and costs, or costs only, it shall be the duty of the said court to discharge such person from further imprisonment for such fine and costs, which discharge shall operate as a complete release of such fine and costs: Pro-

vided, that nothing herein shall authorize any person to be discharged from imprisonment before the expiration of the time for which he may be sentenced to be imprisoned, as part of his punishment.

11. At all times relevant herein, Article II, Section 12, Illinois Constitution, provided:

> No person shall be imprisoned for debt, unless upon refusal to deliver up his estate for the benefit of his creditors, in such manner as shall be prescribed by law; or in cases where there is strong presumption of fraud.

12. In addition, imprisonment of an indigent misdemeanant in excess of one years, due to his financial inability to pay $505 fine and court costs, violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution. *People* v. *Saffore*, 18 N.Y. 2d 101, 218 N.E. 2d 686, 271 N.Y.S. 2d 972 (1966); *Griffin* v. *Illinois*, 351 U.S. 12 (1956); *People ex rel. Herring* v. *Woods*, 37 Ill. 2d 435, 226 N.E. 2d 594 (1967).

WHEREFORE, defendant prays that this Court vacate that portion of its order of September 6, 1967, which directs that defendant stand committed to Cook County Jail in default of payment of $505 fine and costs, and grant defendant sufficient time in which to obtain funds to pay said fine and costs, and grant such other relief as the Court may deem just and appropriate.

Respectfully submitted,

/s/ Stanley A. Bass
Attorney For Defendant
Civil Legal Aid Service
Cook County Jail
Chicago, Illinois 60608
523-0101 ext. 30

[*Duly sworn to by Willie E. Williams jurat omitted in printing (all in italics)*]

IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS

BE IT REMEMBERED, that afterwards, to wit: on November 29th, 1967, the following among other proceedings were had and entered of record in said court which proceedings were and are in words and figures following to-wit:

Present Honorable Joseph R. Gill, One of the Magistrates of the court.

JOHN J. STAMOS
States Attorney

JOSEPH I. WOODS
Bailiff

JOSEPH J. McDONOUGH
Clerk

No. 67 MC 4 53645 Criminal

THE PEOPLE OF THE STATE OF ILLINOIS

v.

WILLIE E. WILLIAMS

It is ordered by the Court that the petition to vacate order of SEPTEMBER 6th, 1967, be and the same is hereby denied.

IN THE CIRCUIT COURT OF COOK COUNTY
FOURTH MUNICIPAL DISTRICT—
CRIMINAL DIVISION

67 MC4-53645
(Maywood)

PEOPLE OF THE STATE OF ILLINOIS

vs.

WILLIE E. WILLIAMS

NOTICE OF APPEAL—Filed November 30, 1967

An appeal is hereby taken to the Illinois Supreme Court from the final judgment and order entered in the above entitled cause, on November 29, 1967, dismissing a Petition brought under Section 72 of the Illinois Civil Practice Act and Section 180-6 of Chapter 38, Ill. Rev. Stat., which sought to vacate portion of order of September 6, 1967, directing that defendant stand committed to jail in default of payment of fine and costs.

WILLIE E. WILLIAMS
No. 413847
2600 South California Avenue
Chicago, Illinois 60608

By: /s/ Stanley A. Bass
STANLEY A. BASS
Attorney For Defendant

Civil Legal Aid Service
Cook County Jail
Chicago, Illinois 60608
523-0101 ext. 30

BE IT REMEMBERED, that to-wit on NOVEMBER 30TH, 1967, a certain PROOFS OF SERVICE OF NOTICE OF APPEAL was filed in the office of the Clerk.

[Omitted in Printing]

BE IT REMEMBERED, that to-wit on DECEMBER 4TH, 1967, a certain PRAECIPE FOR RECORD AND PROOF OF SERVICE [omitted in printing].

[Clerk's Certificate to foregoing transcript omitted in printing.]

IN THE SUPREME COURT OF ILLINOIS

Filed Jan 31, 1968
Mrs. Earle Benjamin Searcy, Clerk

No. 41131

PEOPLE OF THE STATE OF ILLINOIS, PLAINTIFF-APPELLEE

vs.

WILLIE E. WILLIAMS, DEFENDANT-APPELLANT

NOTICE

To: Stanley A. Bass, Esq.
Melvin B. Goldberg, Esq.,
Attorneys for Appellant
Civil Legal Aid Service
Cook County Jail
Chicago, Illinois 60608

PLEASE TAKE NOTICE that on Tuesday, January 30, 1968, at 10:00 a.m., we shall appear before the Honorable Walter V. Schaefer, Justice of the Supreme Court of Illinois, in the Chicago Civic Center, Chicago, Illinois, and then and there present the attached Motion and Affidavit.

JOHN J. STAMOS,
State's Attorney of Cook County

By: /s/ Oliver D. Ferguson
Assistant State's Attorney

State of Illinois)
) ss
County of Cook)

Madeline K. Pavletic, being first duly sworn on oath, says that she served the above and foregoing Notice,

Motion and Affidavit thereto attached by mailing to the above-named attorneys on Thursday, January 25, 1968.

/s/ Madeline K. Pavletic

Subscribed and sworn to before me this 25th day of January, A.D., 1968.

/s/ Donald E. Erickson
Notary Public

State of Illinois)
) ss
County of Cook)

AFFIDAVIT

OLIVER D. FERGUSON, being first duly sworn on oath, deposes and says:

That he is a duly appointed and acting Assistant State's Attorney of Cook County, Illinois, assigned to the Criminal Appeals Division;

That on September 6, 1967, at a bench trial in the Fourth Municipal District of the Circuit Court of Cook County, the Honorable Joseph R. Gill, presiding in Cause No. 67 MC 4 53645, the appellant was found guilty of theft in violation of § 16-1(a)(1) of the Criminal Code;

That judgment was thereupon entered on the finding of guilty and the appellant was sentenced to serve one (1) year in the County Jail and further sentenced to pay a fine of Five Hundred Dollars ($500.) and costs of Five Dollars ($5.00) and, in default of payment of said fine, it was ordered that the appellant, after the expiration of the term of imprisonment, stand committed in the County Jail until said fine and costs shall have been paid

or until the appellant shall have been discharged according to law;

That on November 29, 1967, the appellant, acting through his present counsel, appeared before Magistrate Joseph R. Gill in the Fourth Municipal District of the Circuit Court of Cook County and presented a petition to vacate that portion of the sentence directing the appellant to stand committed to the County Jail after the expiration of his term of imprisonment in default of payment of his fine of $500 and $5.00 costs. The petition sought relief pursuant to § 72 of the Civil Practice Act and Ill.Rev.Stat. 1965, ch.38, § 180-6;

That the appellant's petition was denied on November 29, 1967, and that the instant appeal was taken from the order denying the petition;

That the record on appeal contains no report of proceedings from the trial on September 6, 1967, and no report of the colloquy between the court and counsel on November 29, 1967, when the appellant's petition to vacate a portion of the sentence was presented and denied;

That the facts underlying the sentence and the basis for the denial of the petition to vacate a portion of the sentence are essential to a proper presentation of the issues of law purportedly raised on this appeal;

That although the brief for appellant alleges that the sentencing magistrate denied the petition to vacate a portion of the sentence for legal insufficiency (Appellant's Br., p. 3), that portion of the sentence ordering the appellant to stand committed to the County Jail in default of payment of his fine could not become operative until the expiration of his term of imprisonment;

That portion of the order sentencing the appellant which the appellant sought to vacate by petition was interlocutory in nature and provisional upon the appellant's being in default at a future time, namely at the time of the expiration of his term of imprisonment;

That absent some records or report of the colloquy between the court and counsel specifically setting forth the context in which appellant's petition was denied on November 29, 1967, there are insufficient facts now be-

fore this Honorable Court to raise for review the issues of law set forth in the brief for appellant;

That the rules of this Honorable Court provide that where no verbatim transcript is obtainable, the appellant may prepare a proposed report of proceedings from the best available sources, including recollection. Rule 323(c). That rule is specifically applicable to criminal appeals. Rule 612(c).

WHEREFORE, your affiant prays that this Honorable Court enter an order requiring the appellant to prepare a proper record on appeal in conformity with Rule 608 and Rule 323 (c) of the Rules of this Honorable Court, or, in the alternative, to order this appeal stricken for failure of the Record adequately to show at this time any justiciable controversy.

/s/ Oliver D. Ferguson

Subscribed and sworn to before me this 25th day of January, A.D., 1967.

/s/ Donald E. Erickson
Notary Public

IN THE SUPREME COURT OF ILLINOIS

No. 41131

PEOPLE OF THE STATE OF ILLINOIS, APPELLEE

vs.

WILLIE E. WILLIAMS, APPELLANT

APPELLEE'S MOTION TO REQUIRE APPELLANT TO PREPARE A PROPER RECORD FOR APPEAL, OR, IN THE ALTERNATIVE, TO STRIKE THE INSTANT APPEAL AS PREMATURE

Now come the People of the State of Illinois, through their attorney, JOHN J. STAMOS, State's Attorney of Cook County (Oliver D. Ferguson), and move this Honorable Court to enter an order requiring the appellant to prepared a proper record for appeal in conformity with Rules 612(c) and 323 (c) of the Rules of this Honorable Court, or, in the alternative, to strike the instant appeal as premature.

JOHN J. STAMOS,
State's Attorney of Cook County

By: /s/ Oliver D. Ferguson
OLIVER D. FERGUSON
Assistant State's Attorney

IN THE SUPREME COURT OF ILLINOIS
IN VACATION AFTER THE JANUARY 1968 TERM

No. 41131

PEOPLE OF THE STATE OF ILLINOIS, PLAINTIFF-APPELLEE

vs.

WILLIE E. WILLIAMS, DEFENDANT-APPELLANT

ORDER—Dated January 30, 1968

This cause coming on to be heard, upon the Motion of the People of the State of Illinois, Appellee,

IT IS ORDERED that a bystander's bill of exceptions covering the proceedings of November 29, 1967, be filed by appellant on or before February 15, 1968, and that the appellee's brief be filed within 35 days thereafter.

Dated at Chicago, Illinois, this 30th day of January, 1968.

ENTER:

/s/ Walter V. Schaefer
Justice of the
Supreme Court of Illinois

IN THE SUPREME COURT OF ILLINOIS

No. 41131

PEOPLE OF THE STATE OF ILLINOIS, PLAINTIFF-APPELLEE

vs.

WILLIE E. WILLIAMS, DEFENDANT-APPELLANT

APPELLANT'S ANSWER TO APPELLEE'S MOTION TO REQUIRE APPELLANT TO PREPARE A PROPER RECORD FOR APPEAL OR TO STRIKE APPEAL—Filed January 31, 1968

Defendant-appellant WILLIE E. WILLIAMS, by his attorneys, Stanley A. Bass and Melvin B. Goldberg, Civil Legal Aid Service, Cook County Jail, respectfully submits his answer to the motion of appellee to require appellant to prepare a proper record for appeal, or to strike appeal, and in support thereof states as follows:

1. All proceeding in the court below—trial and hearing on post-trial Petition—occurred in Maywood in the absence of an official court reporter.

2. At all times relevant herein, Chapter 37, Section 163 f(3) provided,

> The official court reporter shall transcribe and furnish an original and copy of the proceedings at the trial of any person sentenced to any imprisonment where, pursuant to Rule (65-1) of the Illinois Supreme Court, an order is or has been entered so requiring. (Applicable rule inserted)

3. Said statute presupposes the obligation to have an official court reporter attend every criminal trial in which the defendant is sentenced to imprisonment.

4. Without waiving his objections to the validity and propriety of such non-reported proceedings, appellant

agrees to attempt immediately to construct a bystander's bill of exceptions, in accordance with the provisions of Illinois Supreme Court Rule 323(c).

Respectfully submitted,

/s/ Stanley A. Bass
Attorney For Appellant

STANLEY A. BASS
MELVIN B. GOLDBERG

Civil Legal Aid Service
Cook County Jail
Chicago, Illinois 60608
523-0101 ext. 30

IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS
FOURTH MUNICIPAL DISTRICT—
CRIMINAL DIVISION

No. 41131

67 MC4-53645
(Maywood)

PEOPLE OF THE STATE OF ILLINOIS

vs.

WILLIE E. WILLIAMS

BYSTANDER'S BILL OF EXCEPTIONS—
Filed February 15, 1968

PROPOSED REPORT OF PROCEEDINGS at the hearing of the above entitled cause before the Honorable Joseph R. Gill, Judge of the said Court, on the 29th day of April, 1967.

APPEARANCES:

HON. JOHN J. STAMOS
State's Attorney, by

MR. EDWARD ROMAN
Assistant State's Attorney
appeared on behalf of the People;

MR. STANLEY A. BASS,
appeared on behalf of defendant.

Defendant was not present.

Counsel for defendant summarized the allegations of his verified Petition to vacate that portion of the Court's order of September 6, 1967, which directs that defendant stand committed to Cook County Jail in default of payment of $505 fine and costs.

Counsel for the People orally moved that the Petition be denied. No testimony or evidence was received, and no court reporter was present.

The Court denied the Petition on its face for the reason that petitioner was not legally entitled at that time to the relief requested in the Petition, because he still has time to serve on his jail sentence, and when that sentence has been served his financial ability to pay a fine might not be the same as it is of the date of Sept. 6, 1967.

APPROVED:

/s/ Joseph R. Gill
Judge

February 14, 1968

IN THE SUPREME COURT OF ILLINOIS

No. 41131

Filed May 1, 1968, Clell L. Woods, Clerk

PEOPLE OF THE STATE OF ILLINOIS, APPELLEE

vs.

WILLIE E. WILLIAMS, APPELLANT

NOTICE

To: Stanley A. Bass, Esq.
Civil Legal Aid Service
Cook County Jail
2600 South California Avenue
Chicago, Illinois 60608

PLEASE TAKE NOTICE that on Tuesday, April 16, 1968, at 10:00 a.m., we shall appear before the Honorable Walter V. Schaefer, Justice of the Supreme Court of Illinois, in the Chicago Civic Center, Chicago, Illinois, and then and there present the attached Motion and Affidavit.

JOHN J. STAMOS,
State's Attorney of Cook County

By: /s/ Oliver D. Ferguson
Assistant State's Attorney

State of Illinois)
) ss
County of Cook)

Virginia E. Murphy, being first duly sworn on oath, says that she served the above and foregoing Notice, Motion and Affidavit thereto attached by mailing to the above-named attorney on April 15, 1968. That attorney for appellant has waived notice of the instant motion.

/s/ Virginia E. Murphy

Subscribed and sworn to before me this 15th day of April, A.D., 1968.

/s/ Donald E. Erickson
Notary Public

State of Illinois)
) ss
County of Cook)

AFFIANT

OLIVER D. FERGUSON, being first duly sworn on oath, deposes and says:

That he is a duly appointed and acting Assistant State's Attorney of Cook County, Illinois, assigned to the Criminal Appeals Division;

That on September 6, 1967, at a bench trial in the Fourth Municipal District of the Circuit Court of Cook County, the Honorable Joseph R. Gill, presiding in Cause No. 67 MC 4 53645, the appellant was found guilty of theft in violation of § 16-1(a)(1) of the Criminal Code;

That judgment was thereupon entered on the finding of guilty and the appellant was sentenced to serve one (1) year in the County Jail and further sentenced to pay a fine of Five Hundred Dollars ($500) and costs of Five Dollars ($5.00) and, in default of payment of said fine, it was ordered that the appellant, after the expiration of the term of imprisonment, stand committed in the County Jail until said fine and costs shall have been paid or until the appellant shall have been discharged according to law;

That on November 29, 1967, the appellant, acting through his present counsel, appeared before Magistrate Joseph R. Gill in the Fourth Municipal District of the Circuit Court of Cook County and presented a petition to vacate that portion of the sentence directing the appellant to stand committed to the County Jail after the expiration of his term of imprisonment in default of payment of his fine of $500 and $5.00 costs. The petition sought relief pursuant to § 72 of the Civil Practice Act and Ill. Rev. Stat., 1965, ch. 38, § 180-6;

That the appellant's petition was denied on November 29, 1967, and that the instant appeal was taken from the order denying the petition;

That on February 15, 1968, a Bystander's Bill of Ex-

ceptions was filed in the Office of the Clerk of this Honorable Court in which the Magistrate before whom the cause was tried stated that he had denied the petition to vacate a portion of the sentence because the defendant was not legally entitled at that time to the relief requested in the Petition to vacate, and "because he still has time to serve on his jail sentence and when that sentence has been served his financial ability to pay a fine might not be the same" as it was on September 6, 1967;

That the issues argued before this Honorable Court at the January Term in People of the State of Illinois ex rel. Hosea Jackson versus C. William Ruddell, Superintendent, Municipal House of Correction are still pending before the court and the opinion of this court in that case could very well settle the point at issue in the instant case;

WHEREFORE, the People of the State of Illinois, as appellee in the above-styled cause, request an extension of time for the filing of a Brief until June 5, 1968.

/s/ Oliver D. Ferguson

Subscribed and sworn to before me this 15th day of April, A.D., 1968.

/s/ Donald E. Erickson
Notary Public

IN THE SUPREME COURT OF ILLINOIS

No. 41131

PEOPLE OF THE STATE OF ILLINOIS, APPELLEE

vs.

WILLIE E. WILLIAMS, APPELLANT

MOTION

The People of the State of Illinois, by their attorney, JOHN J. STAMOS, State's Attorney of Cook County, Illinois, move for the entry of an order extending the time for filing the Brief and Argument for the People in this cause to and including June 5, 1968, and in support of said Motion submit the following Affidavit.

JOHN J. STAMOS,
State's Attorney of Cook County

By: /s/ Oliver D. Ferguson
Assistant State's Attorney

IN THE SUPREME COURT OF ILLINOIS

No. 41131

Filed May 1, 1968, Clell L. Woods, Clerk

PEOPLE OF THE STATE OF ILLINOIS, PLAINTIFF-APPELLEE

vs.

WILLIE E. WILLIAMS, DEFENDANT-APPELLANT

ORDER

On Motion of the People of the State of Illinois, it is hereby Ordered that the Brief and Argument for the People of the State of Illinois be filed to and including May 2, 1968.

ENTER:

/s/ Thomas E. Kluczy
Justice of the
Supreme Court of Illinois

IN THE SUPREME COURT OF ILLINOIS

No. 41131

Received Criminal Court Bldg. May 22, 1968
John J. Stamos, States Attorney

PEOPLE OF THE STATE OF ILLINOIS, PLAINTIFF-APPELLEE

vs.

WILLIE E. WILLIAMS, DEFENDANT-APPELLANT

MOTION TO ENLARGE DEFENDANT-APPELLANT ON HIS OWN RECOGNIZANCE BOND OR REASONABLE BOND PENDING DECISION HEREIN

Defendant-appellant, WILLIE WILLIAMS, by his attorney, Stanley A. Bass, respectfully moves for an order enlarging him on recognizance bond or reasonable bond pending the Court's decision herein, and in support thereof states as follows:

1. On May 23, 1968, defendant-appellant, WILLIE WILLIAMS, will have completed service of his one year sentence to imprisonment in Cook County Jail, with time off for good conduct and for time spent in custody awaiting trial. (See attached jail record.)

2. On May 23, 1968, Willie Williams begins incarceration in Cook County Jail in default of payment of his $505 fine and costs, at the rate of $5 per day, and he is scheduled to be released on August 31, 1968. (See attached jail record.)

3. The instant appeal, which was argued orally on May 16, 1968, challenges the constitutional validity of that portion of the sentencing judge's order directing that defendant stand committed to jail in default of payment of $505 fine and costs, which would result in the indigent defendant spending more total time in jail for petty theft than his more affluent counterpart, in violation of equal protection of the

laws. *People* v. *Saffore*, 18 N.Y. 2d 101, 218 N.E. 2d 686 (1966).

4. In order to prevent the serious constitutional issue in this case from becoming moot, and in order to avoid further incarceration of the defendant—which this Court may find to be unlawful, it is appropriate to enlarge the indigent defendant-appellant on his own recognizance bond or reasonable bond pending the Court's decision herein.

WHEREFORE, defendant-appellant prays that the relief requested herein be granted.

Respectfully submitted,

/s/ Stanley A. Bass
STANLEY A. BASS
Attorney For Appellant

State of Illinois)
) ss
County of Cook)

STANLEY A. BASS, being first duly sworn on oath, deposes and says: I have read the above motion, and know the contents thereof to be true and correct to the best of my knowledge and belief.

/s/ Stanley A. Bass
Affiant

Subscribed and sworn to before me this 22nd day of May, 1968.

/s/ [Illegible]
Notary Public
My commission expires May 1, 1970

RM 50 MAYWOOD

INMATE'S RECORD - COOK COUNTY JAIL

INDICTMENT NUMBER	HOW HELD	BAIL	COMMITTED BY	CHARGE	Date Charges Recorded
MC4-53645	CASE CONT. 8-16-67 9/6	2000	FORFEIT	THEFT	AUG 14 196

CT. DATES JUDGE	DATE	CT. DATES JUDGE	DATE	CT. DATES JUDGE	DATE

SENTENCE WITHOUT G. T. AUG 13 1968
JUN 14 1968
MAY 23 1968 ✓
ASSIGNED BY

With Fine Work Cost 101 Days $5.00 Ruby AUG 31 1968 ✓

WARRANTS:

SPECIAL ORDERS:

WITH: ✓

SENTENCED TO: SENT TO C.C.J. (1) yr. cnd 505-

BY JUDGE: Hill

DATE: SEP 6 1967

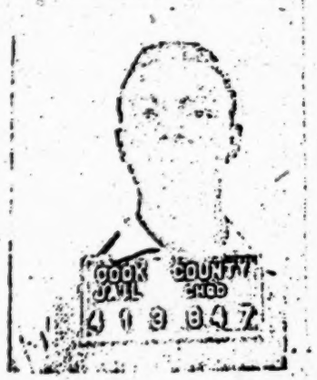
RELEASED:

HOW RELEASED:

TIME

Block	Floor	Cell	Date	Time	REMARKS:
	3				
	3		9-7-67		P.T.
	2		9-8-67		Laundry
	3		2-25-68		Rec
	2		4-9-68		Tailor Shop

Block	Floor	Cell	Date	Time	REMARKS:



ADDRESS: 1847 W. HASTING

NAME: WILLIAMS WILLIE E

JAIL NO: 413847

ALIAS:

TIME ENTERED: 3:55 p

UNITED STATES OF AMERICA

State of Illinois)
) ss.
Supreme Court)

At a Term of the Supreme Court, began and held in Springfield, on Monday, the thirteenth day of May in the year of our Lord, one thousand nine hundred and sixty-eight, within and for the State of Illinois.

PRESENT: ROY J. SOLFISBURG, JR., CHIEF JUSTICE
JUSTICE WALTER V. SCHAEFER
JUSTICE BYRON O. HOUSE
JUSTICE THOMAS E. KLUCZYNSKI
JUSTICE RAY I. KLINGBIEL
JUSTICE ROBERT C. UNDERWOOD
JUSTICE DANIEL P. WARD
WILLIAM G. CLARK, ATTORNEY GENERAL
ROBERT G. MILEY, MARSHAL
ATTEST: CLELL L. WOODS, CLERK

BE IT REMEMBERED, that, to-wit: on the 28th day of May, A.D. 1968, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said Court, had and entered of record, to-wit:

No. 41131

PEOPLE STATE OF ILLINOIS, APPELLEE

vs.

WILLIE E. WILLIAMS, APPELLANT

APPEAL FROM CIRCUIT COURT COOK COUNTY
(Municipal Division)

And now, on this day, the Court having duly considered the motion by appellant that he be admitted to bail, and being fully advised of and concerning the premises;

IT IS HEREBY ORDERED that the motion by appellant that he be admitted to bail be, and the same is, allowed, and bond fixed in the amount of $500.00 to be approved by the Warden of the Cook County Jail.

IN THE SUPREME COURT OF ILLINOIS

Docket No. 41131—Agenda 24—May, 1968

THE PEOPLE OF THE STATE OF ILLINOIS, APPELLEE

vs.

WILLIE E. WILLIAMS, APPELLANT

OPINION—Filed January 29, 1969

MR. JUSTICE HOUSE delivered the opinion of the court:

The sole question raised by this appeal is whether imprisonment of an indigent defendant to satisfy his fine constitutes a denial of equal protection of the law under the rationale of *Griffin* v. *Illinois*, 351 U.S. 12, 100 L. Ed. 891, 76 S. Ct. 585.

On August 16, 1967, defendant, Willie E. Williams, was convicted of theft of property not from the person and not exceeding $150 in value in a bench trial in the circuit court of Cook County. The court sentenced him to one year imprisonment in the county jail and imposed a fine of $500, a maximum sentence for this offense (Ill. Rev. Stat. 1967, ch. 38, par. 16—I), and $5 costs. The judgment order provides that in default of payment of the fine and costs defendant should stand committed to jail to satisfy the fine and costs at the rate of $5 per day of imprisonment.

On November 29, 1967, defendant filed a petition under section 72 of the Civil Practice Act, alleging under oath that he was indigent at all stages of the proceedings, that he was without counsel or funds to hire counsel at the trial and that he will be able to get a job and earn funds to pay the fine and costs if he is released from jail upon expiration of his one-year sentence. He prayed that the trial court vacate that portion of the order directing that he stand committed to jail in default of the payment of the fine and costs. The court denied the petition because of its legal insufficiency and defendant appealed directly to this court alleging that the denial of his petition deprived him of equal protection of the law

guaranteed by the fourteenth amendment to the Federal constitution.

The authority for imprisonment to enforce payment of a fine comes from section 1—7(k) of the Criminal Code of 1961. (Ill. Rev. Stat. 1967, ch. 38, par. 1—7(k).) This section provides, "Working out Fines. A judgment of a fine imposed upon an offender may be enforced in the same manner as a judgment entered in a civil action; Provided, however, that in such judgment imposing the fine the court may further order that upon non-payment of such fine, the offender may be imprisoned until the fine is paid, or satisfied at the rate of $5.00 per day of imprisonment; Provided, further, however, that no person shall be imprisoned under the first proviso hereof for a longer period than 6 months."

The basis of defendant's equal-protection theory seems to find its origin in a dissenting opinion in *Wildeblood* v. *United States* (D.C. Cir. 1960), 284 F.2d 592. It was there stated: "When the person sentenced cannot pay the fine and is therefore imprisoned, the constitutional question arises. The answer seems clear. The cases on which the court [the majority opinion] relies were decided many years ago, [*Ex parte Jackson*, 1877, 96 U.S. 727, 24 L. Ed. 877; *Bowles* v. *District of Columbia*, 1903, 22 App. D.C. 321; *Hill* v. *Wampler*, 1936, 298 U.S. 460, 56 S. Ct. 760, 80 L. Ed. 1283; *Yeager* v. *District of Columbia*, D.C. Mun. App. 1943, 33 A.2d 629,] and the constitutional question does not appear to have been raised. More recently, the Supreme Court has repeatedly held that 'invidious discriminations' in the administration of criminal justice are unconstitutional. *Griffin* v. *Illinois*, 1956, 351 U.S. 12, 17, 76 S. Ct. 585, 100 L. Ed. 891; *Eskridge* v. *Washington Prison Board*, 1958, 357 U.S. 214, 78 S. Ct. 1061, 2 L. Ed. 2d 1269; *Burns* v. *Ohio*, 1959, 360 U.S. 252, 79 S. Ct. 1164, 3 L. Ed. 2d 1209. Specifically, the Court has held that 'There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.' *Griffin* v. *Illinois*, 351 U.S. 12, 19, 76 S. Ct. 100 L. Ed. 891. Few would care to say there can be equal justice where the kind of punishment a man gets depends on the amount of money he has." (284 F.2d 592,

594). The majority in *Wildeblood* followed cases decided prior to *Griffin* wherein imprisonment for nonpayment of a fine was permitted and simply stated, "We do not think these cases are overruled by Griffin v. Illinois * * *." 284 F.2d 592, 598.

In *United States ex rel. Privitera* v. *Kross* (S.D.N.Y.), 239 F. Supp. 118, aff'd (2d cir.) 345 F.2d 533, *cert.* denied 382 U.S. 911, 15 L. Ed. 2d 163, 86 S. Ct. 254, the issue raised in the *Wildeblood* dissent was again decided adversely to the indigent defendant. After noting that a defendant "has no constitutional right that another defendant, no matter what his economic status, rich or poor, receive the same sentence for the same offense," the court stated: "No different conclusion is required by the line of cases beginning with *Griffin* v. *People of State of Illinois.* Those decisions making review of criminal convictions available to the indigent have not yet been construed to compel government, State or Federal, to eradicate from the administration of criminal justice every disadvantage caused by indigence." (239 F. Supp. 118, 120-121.) In support of this statement the court cited "Norvell v. State of Illinois, 373 U.S. 420, 83 S. Ct. 1336, 10 L. Ed. 2d 456 (1963); United States ex rel. Marshall v. Wilkins, 338 F.2d 404 (2d Cir. 1964) (no absolute right to appointment of counsel on habeas corpus petitions); United States ex rel. Combs v. Denno, 231 F. Supp. 942, 945 (S.D.N.Y. 1964); Mastrian v. Hedman, 326 F.2d 708 (8th Cir.) cert. denied, 376 U.S. 965, 84 S. Ct. 1128, 11 L. Ed. 2d 982 (1964) (may impose bail on those without funds); Pilkinton v. Circuit Court, 324 F.2d 45 (8th Cir. 1963); Stern & Gressman, Supreme Court Practice 219 (3d ed. 1962) (no right to appointment of counsel on petition for certiorari)." 239 F. Supp. 118, 121 n. 12.

In view of this holding in *Kross* which was affirmed by the Second Circuit Court of Appeals and to which a writ of *certiorari* was denied by the Supreme Court, we do not feel justified in holding that imprisonment of an indigent defendant to satisfy his fine constitutes a denial of equal protection of the law under the fourteenth amendment. Defendant urges us to follow the reasoning and holding of *People* v. *Saffore*, 18 N.Y.2d 101, 218 N.E.2d 686. In

that case, like this one, defendant was convicted of a misdemeanor and given the maximum sentence of one year of imprisonment and required to pay a fine of $500, the fine if not paid, to be served out at the rate of one day's imprisonment for each dollar remaining unpaid. The sentencing court knew defendant was without funds or property and was unable to pay the fine. The New York Court stated, "We do not hold illegal every judgment which condemns a defendant to confinement if he does not pay his fine. We do hold that, when payment of a fine is impossible, imprisonment to work out the fine, if it results in a total imprisonment of more than a year for a misdemeanor, is unauthorized by the Code of Criminal Procedure and violates the defendant's right to equal protection of the law, and the constitutional ban against excessive fines." 18 N.Y.2d 101, 218 N.E.2d 686, 688.

A limitation similar to that used in *Saffore* was applied in *Sawyer* v. *District of Columbia* (D.C.C.A.), 238 A.2d 314. was there held that "in every case in which the defendant is indigent, a sentence of imprisonment in default of payment of a fine which exceeds the maximum term of imprisonment which could be imposed under the substantive statute as an original sentence is an invalid exercise of the court's discretion for the reason that its only conceivable purpose is to impose a longer term of punishment than is permitted by law." (238 A.2d 314, 318.) This decision was based solely on the trial judge's discretion in enforcing payment of fine.

The one-year limitation applied in *Saffore* and the maximum-term-as-an-original-sentence limitation applied in *Sawyer* were both based on the construction of statutes involved in each case. This court has rejected both of these limitations in construing the statutes of this State authorizing imprisonment to enforce or satisfy the payment of a fine. (*Berkenfield* v. *People*, 191 Ill. 272; *People* v. *Jaraslowski*, 254 Ill. 299; *People ex rel. Hoyne* v. *Windes*, 283 Ill. 251.) Thus, in *Jaraslowski* it was stated: "There was no error in the judgment of the court in requiring plaintiff in error to work out his fine after his term of imprisonment expired, notwithstanding the maximum term of imprisonment was imposed." 254 Ill.

299, 305. Jaraslowski, a pauper, in addition to the fine, had received a one-year sentence which was the maximum term for the offense committed, as in *Sawyer*, and the maximum term for a misdemeanor, as in *Saffore*. The factual situation in *Windes* was the same and the court in following *Jaraslowski* stated: "The statute was intended to enable the State to collect in labor fines that could not be collected by execution, and applies as well to a case where a person is able to pay in labor but not in money as to a case where he is able to pay in money but unwilling to do so." 283 Ill. 251, 254-255.

The legislature has not acted to change the result reached in *Jaraslowski* or *Windes*. On the contrary, the comments of the Joint Committee to Revise the Illinois Criminal Code state with respect to section 1—7(k): "No provision is made for discharge on a pauper's oath since it is considered that on any conviction for a criminal offense the intent present is equivalent to the malice requirement in civil cases, in which discharge prior to the six months limit may be obtained only upon payment of the judgment." (Committee Comments, S.H.A. ch. 38, § 1—7, p. 31.) The legislative intent is clear that section 1—7(k) should apply to all defendants, rich or poor, and it cannot be construed to accomplish the result reached in *Saffore* or *Sawyer*.

Defendant has also directed our attention to section 180—6 of the Code of Criminal Procedure. (Ill. Rev. Stat. 1967, ch. 38, par. 180—6.) This section provides: "Whenever it shall be made satisfactorily to appear to the court, after all legal means have been exhausted, that any person who is confined in jail for any fine or costs or prosecution, for any criminal offense, hath no estate wherewith to pay such fine and costs, or costs only, it shall be the duty of the said court to discharge such person from further imprisonment for such fine and costs, which discharge shall operate as a complete release of such fine and costs: Provided, that nothing herein shall authorize any person to be discharged from imprisonment before the expiration of the time for which he may be sentenced to be imprisoned, as part of his punishment." He concedes that defendants have not been permitted to

be discharged from imprisonment for nonpayment of a fine, under this statute, unless they were physically unable to work at the institution of confinement or no work was provided there for them. (See *People* v. *Jaraslowski*, 254 Ill. 299; *People ex rel. Hoyne* v. *Windes*, 283 Ill. 251; *People* v. *Herman*, 245 Ill. App. 94; *People* v. *Cary*, 245 Ill. App. 100, and *People* v. *Hedenberg*, 21 Ill. App. 2d 504.) But he suggests that we now give the statute a liberal construction in order to avoid the constitutional issue of equal protection of the law.

As we have said, there is no denial of equal protection of the law when an indigent defendant is imprisoned to satisfy payment of the fine. Furthermore, once a statute has such a well settled construction over a long period of time and the legislature does not amend the statute, it would amount to a judicial amendment were we now to change our interpretation of it. (*Schwarz* v. *Schwarz*, 27 Ill.2d 140, 150.) This we cannot do.

For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

UNITED STATES OF AMERICA

State of Illinois)
) ss.
Supreme Court)

At a Term of the Supreme Court, began and held in Springfield, on Monday, the thirteen day of January in the year of our Lord, one thousand nine hundred and sixty-nine, within and for the State of Illinois.

PRESENT: ROY J. SOLFISBURG, JR., CHIEF JUSTICE
JUSTICE WALTER V. SCHAEFER
JUSTICE BYRON O. HOUSE
JUSTICE THOMAS E. KLUCZYNSKI
JUSTICE RAY I. KLINGBIEL
JUSTICE ROBERT C. UNDERWOOD
JUSTICE DANIEL P. WARD
WILLIAM J. SCOTT, ATTORNEY GENERAL
ROBERT G. MILEY, MARSHAL
ATTEST: JUSTIN TAFT, CLERK

Be It Remembered, that, to-wit: on the 29th day of January 1969, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said court, had and entered of record, to-wit:

No. 41131
67 MC4-53645

PEOPLE STATE OF ILLINOIS, APPELLEE

vs.

WILLIE E. WILLIAMS, APPELLANT

APPEAL FROM CIRCUIT COURT COOK COUNTY
(Municipal Division)

And now, on this day, this cause having been argued by counsel, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as matters and things therein assigned for error,

and now, being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the judgment aforesaid, is there anything erroneous, vicious or defective, and in that record there is no error.

THEREFORE, it is considered by the Court that the judgment of the Circuit Court of Cook County (Municipal Division) aforesaid, BE AFFIRMED IN ALL THINGS AND STAND IN FULL FORCE AND EFFECT, notwithstanding the said matter and things therein assigned for error.

I, JUSTIN TAFT, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said court this ..... day of ....., 19 .....

Clerk,
Supreme Court of the
State of Illinois.

IN THE SUPREME COURT OF ILLINOIS

No. 41131

PEOPLE OF THE STATE OF ILLINOIS, PLAINTIFF-APPELLEE

vs.

WILLIE E. WILLIAMS, DEFENDANT-APPELLANT

NOTICE OF MOTION

To: Edward V. Hanrahan
State's Attorney of Cook County
Chicago Civic Center
Room 1500
Chicago, Illinois

PLEASE TAKE NOTICE that on Tuesday, February 11, 1969, at 10:00 A.M., I shall appear before a Justice of the Illinois Supreme Court, 30th floor, Chicago Civic Center, and then and there present the attached motion to stay mandate pending appeal to the United States Supreme Court.

/s/ Stanley A. Bass
STANLEY A. BASS
Attorney For Appellant

Community Legal Counsel
116 South Michigan Avenue
Chicago, Illinois 60603
726-0157

February 5, 1969

IN THE SUPREME COURT OF ILLINOIS

No. 41131

Received, Criminal Appeals, Feb. 6, 1969, 500 Civic Center, Edward V. Hanrahan, States Attorney

PEOPLE OF THE STATE OF ILLINOIS, PLAINTIFF-APPELLEE

vs.

WILLIE E. WILLIAMS, DEFENDANT-APPELLANT

MOTION TO STAY MANDATE PENDING APPEAL TO THE UNITED STATES SUPREME COURT

Defendant-Appellant, WILLIE E. WILLIAMS, by his attorney, Stanley A. Bass, respectfully moves, pursuant to Ill. Sup. Ct. Rule 368(c), to stay the mandate herein pending his appeal to the United States Supreme Court.

In support of this motion, counsel states:

1. Defendant-appellant was ordered released by this Court on $500 bond pending appeal herein.

2. On January 29, 1969, this Court affirmed the judgment of the Circuit Court of Cook County, denying defendant's petition to vacate that portion of the sentencing order directing that he stand committed to jail in default of payment of $500 fine and $5.00 costs.

3. In so ruling, this Court declined to adopt the position taken by the New York Court of Appeals, in *People* v. *Saffore*, 18 N.Y. 2d 101, 218 N.E. 2d 686 (1966), and by the District of Columbia Court of Appeals, in *Sawyer* v. *District of Columbia*, 238 A. 2d 314 (1968), holding that sentence disparity based upon poverty violates Equal Protection of the Laws.

4. Counsel for defendant-appellant herein is presently preparing, and will timely file, his notice of appeal to the United States Supreme Court, and his Jurisdictional Statement. No rehearing will be sought in this Court.

5. Appellant's constitutional challenge to Chapter 38, Section 1-7(K), Ill. Rev. Stat., is substantial, and his appeal to the United States Supreme Court is taken in good faith, and not for the purpose of delay.

WHEREFORE, defendant-appellant prays that the mandate herein be stayed pending appeal to the United States Supreme Court.

Respectfully submitted,

/s/ Stanley A. Bass
STANLEY A. BASS

Community Legal Counsel
116 South Michigan Avenue
Chicago, Illinois 60603
726-0157

Dated: February 5, 1969

State of Illinois)
) ss
County of Cook)

STANLEY A. BASS, being first duly sworn on oath, deposes and says that he caused the above motion to be prepared, and that he knows the contents thereof to be true and correct to the best of his knowledge and belief.

/s/ Stanley A. Bass
Affiant

Subscribed and sworn to before me this 5th day of February, 1969.

/s/ [Illegible]
Notary Public

IN THE SUPREME COURT OF ILLINOIS

No. 41131

PEOPLE OF THE STATE OF ILLINOIS, PLAINTIFF-APPELLEE

vs.

WILLIE E. WILLIAMS, DEFENDANT-APPELLANT

DRAFT ORDER

This matter comes before the Court on motion of defendant-appellant to stay the mandate herein pending appeal to the United States Supreme Court,

And the Court being duly advised in the premises,

WHEREFORE, IT IS ORDERED that the mandate herein be stayed pending final disposition of appellant's appeal to the United States Supreme Court.

ENTER:

/s/ Daniel P. Ward
Justice

February 11, 1969

IN THE SUPREME COURT OF ILLINOIS

No. 41131

Received Criminal Appeals, Feb. 11, 1969, 500 Civic Center, Edward V. Hanrahan, States Attorney

PEOPLE OF THE STATE OF ILLINOIS, PLAINTIFF-APPELLEE

vs.

WILLIE E. WILLIAMS, DEFENDANT-APPELLANT

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Willie E. Williams, defendant above named, hereby appeals to the Supreme Court of the United States from the final judgment of this Court entered on January 29, 1969, affirming the final judgment of the Circuit Court of Cook County, Illinois. This appeal is taken pursuant to 28 U.S.C. § 1257(2).

/s/ Stanley A. Bass
STANLEY A. BASS
-Attorney For Defendant-
Appellant

Community Legal Counsel
116 South Michigan Avenue
Chicago, Illinois 60603
726-0157

February 11, 1969

PROOF OF SERVICE

Received Feb. 11, 1969
William J. Scott, Attorney General

[Clerk's Certificate to foregoing transcript omitted in printing.]

SUPREME COURT OF THE UNITED STATES

No. 156 Misc., October Term, 1969

WILLIE E. WILLIAMS, APPELLANT

v.

ILLINOIS

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis*,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted.

January 19, 1970

SUPREME COURT OF THE UNITED STATES

No. 156 Misc., October Term, 1969

WILLIE E. WILLIAMS, APPELLANT

v.

ILLINOIS

APPEAL from the Supreme Court of the State of Illinois.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted. The case is transferred to the appellate docket as No. 1089, and placed on the summary calendar.

January 19, 1970

☆ U. S. GOVERNMENT PRINTING OFFICE: 1970 375644 476

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1089

WILLIE E. WILLIAMS,

Appellant,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Appellee.

On Appeal From the Supreme Court of Illinois

BRIEF OF THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION AS AMICUS CURIAE

ALLAN ASHMAN,
1155 E. 60th Street,
Chicago, Illinois 60637,

Attorney for Amicus Curiae
NATIONAL LEGAL AID AND
DEFENDER ASSOCIATION

March 5, 1970

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TABLE OF AUTHORITIES

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Supreme Court of the United States

October Term, 1969

No. 1089

WILLIE E. WILLIAMS,

Appellant,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Appellee.

On Appeal From The Supreme Court Of Illinois

BRIEF OF THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION AS AMICUS CURIAE

The National Legal Aid and Defender Association files this Brief Amicus Curiae pursuant to the written consent of the parties submitted herewith.

INTEREST OF AMICUS CURIAE.

The National Legal Aid and Defender Association, hereinafter called NLADA, is a non-profit corporation whose primary purpose is to assist in providing more and better legal services for the poor. Its members include a great majority of defender offices, coordinated assigned counsel systems, and legal aid societies in the

United States. NLADA also has 1600 professional members, many of whom are practicing attorneys who represent indigent persons in criminal and civil matters.

The guiding philosophy of the NLADA and its members is that each citizen, regardless of his social and economic status, is entitled to equal justice under law. We, therefore, concur with the President's Commission on Law Enforcement and Administration of Justice which observed that: "Two unfortunate characteristics of sentencing practices in many lower courts are the routine imposition of fines on the great majority of misdemeanants and petty offenders and the routine imprisonment of defendants who default in paying fines. These practices result in unequal punishment of offenders and in the needless imprisonment of many persons because of their financial condition." *Task Force Report: The Courts* 18 (1967). The Report urged that society devise suitable alternative punishments so that those unable to pay will not be punished more severely than those of greater means. In the case presently before this Court the Illinois Supreme Court affirmed a lower court judgment imposing a $500 fine and $5 costs on the appellant and directed that in default of payment he be committed to jail to satisfy the unpaid fine and costs at the rate of $5 per day. The court held that there is no denial of equal protection of the law "when an indigent defendant is imprisoned to satisfy payment of the fine." It is our contention that such a practice does indeed violate the constitutional rights of those too poor to pay.

The imprisonment of an indigent for failure to pay a fine is an issue of vital concern to members of NLADA, many of whom represent indigents who face possible

imprisonment for failure to pay a fine. The NLADA urges a reversal of the judgment of the Illinois Supreme Court because we believe that it is inherently unjust to permit indiscriminate imprisonment of indigent defendants simply because of their inability to pay fines and because we believe that the Constitution specifically prohibits the incarceration of indigent defendants for periods in excess of that authorized by statute solely because of their financial inability to pay fines and costs, also imposed as a penalty.

In view of the direct importance of this case to legal aid attorneys serving the poor throughout the country, and to the poor themselves, the Executive Committee of the NLADA, has authorized and instructed the NLADA staff to prepare and file an Amicus Brief in this case.

OPINION BELOW.

The opinion of the Supreme Court of Illinois is reported in 41 Ill. 2d 511, 244 N.E. 2d 197 (1969). There was no opinion in the court of the first instance, the Fourth Municipal District of the Circuit Court of Cook County, Illinois.

JURISDICTION.

The jurisdiction of this Court to review by appeal the judgment of the Supreme Court of Illinois is conferred by 28 U.S.C. 1257 (2). Probable jurisdiction was noted on January 19, 1970.

STATUTORY PROVISIONS INVOLVED.

The relevant Illinois statutory provisions are: (1) ch. 38, par. 1-7, (k), Ill. Rev. Stat. (1967) and (2) ch. 38, par. 180-6, Ill. Rev. Stat. (1967). These statutes are set out in full in Appendix B, pp. 6a-8a of appellant's jurisdictional statement.

QUESTION PRESENTED.

Whether incarcerating a defendant for a period in excess of that authorized by statute solely because of his inability to pay a fine and costs, also imposed as a penalty, is a denial of equal protection of law.

STATEMENT OF THE CASE.

The NLADA adopts Appellant's Statement.

SUMMARY OF ARGUMENT.

The Supreme Court has stated on a number of occasions that a denial of equal protection results when a state apportions justice according to the dollar. A clear implication of *Griffin* v. *Illinois*, 351 U.S. 12 (1956) and

its "progeny", such as *Burns* v. *Ohio*, 360 U.S. 252 (1959) and *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), is that any system of incarceration for failure to pay a fine which is unmitigated by any effort to accommodate itself to the poverty of individual defendants makes the real sentence a man gets depend upon the amount of money he has.

Imprisonment for failure to pay a fine can validly be used only as a means to coerce payment of a fine and should not be used when the defendant is unable to pay.

The Illinois statute involved here allows a man of means to avoid incarceration while denying the same opportunity to an indigent.

The laws of each of the fifty states provide for incarceration of defendants who are unable to pay fines adjudged against them. Only three states forbid imprisonment for failure to pay a fine where such imprisonment results in a defendant's confinement for a period longer than the maximum term allowed by law upon conviction of the offense. In states without such a statutory provision, imprisonment beyond the maximum term allowed by law is possible.

The number of persons incarcerated for failure to pay fines is substantial.

The practice of incarcerating those unable to pay fines affects thousands of poor persons in the United States each year insofar as it may result in the imprisonment of indigents for a longer term than that allowed by statute and should not be allowed to persist.

ARGUMENT.

I.

IMPRISONING A DEFENDANT FOR A PERIOD IN EXCESS OF THAT AUTHORIZED BY STATUTE SOLELY BECAUSE OF HIS FINANCIAL INABILITY TO PAY A FINE AND COSTS, ALSO IMPOSED AS A PENALTY, IS A DENIAL OF EQUAL PROTECTION OF LAW.

Historically, a fine was conceived as an alternative to a jail or prison sentence. Today, it is not uncommon that the result of a fine is the "very jail sentence which is sought to be avoided." See A.B.A. MINIMUM STANDARDS FOR CRIMINAL JUSTICE, *Sentencing Alternatives and Procedures* 119 (Approved Draft, 1968). The broad question, and one indirectly at issue in the instant case, is whether any statutory scheme resulting in an indigent's incarceration resulting fully from his inability to pay a fine is unconstitutional. Not at issue is the question of whether fines, as such, are a valid criminal sanction. Specifically, the narrow question for determination before this Court is whether an indigent appellant can be made to serve out a fine at $5 per day *in addition* to the maximum term of imprisonment allowable for the offense. Ill. Rev. Stat. Ch. 38, par. 1-7 (k) (1967).

Pursuant to the statutory authority cited above the appellant was sentenced to 101 additional days in jail beyond his maximum term of imprisonment, because of his inability to pay a fine and court costs totaling $505. Illinois is imposing additional imprisonment for no reason other than indigency. The statute, and its application in the case at bar, raise a serious question of a

fundamental deprivation of rights under the Equal Protection Clause of the Fourteenth Amendment.

This Court has restated on several occasions propositions fundamental to our form of government—that all men stand equally before the law, that the same justice must be meted out to the rich and to the poor alike, and that to deny these tenets amounts to a denial of equal protection. This Court stated in *Griffin* v. *Illinois,* 351 U.S. 12, 17 (1956) that "in criminal trials a state can no more discriminate on account of poverty than on account of religion, race, or color." Similarly, this Court has stated that "lines drawn on the basis of wealth or poverty, like those of race, are traditionally disfavored . . ." *Harper* v. *Virginia State Board of Elections,* 383 U.S. 663, 668 (1966).

The case presently before this Court presents a stock example of a denial of equal protection of laws wherein a state apportions justice according to the dollar. This situation was condemned by this Court in *Griffin, supra* at 19, wherein it stated "there can be no equal justice where the kind of trial a man gets depends upon the amount of money he has." Just as poverty should not be the sole reason for denying a man access to trial and appellate courts, so poverty should not be the sole reason for a person's incarceration. Yet, this is precisely the case if a rich man can pay his fine and *not* be imprisoned and a poor man who cannot pay his fine *is* imprisoned. The poor man is suffering punishment for his poverty rather than punishment for the substantive offense for which he was convicted.

A clear implication of *Griffin* and its "progeny"—such as *Burns* v. *Ohio,* 360 U.S. 252 (1959), *Smith* v.

Bennett, 365 U.S. 708 (1961), *Gideon* v. *Wainwright,* 372 U.S. 335 (1963), and *Douglas* v. *California,* 372 U.S. 353 (1963),—is that any system of incarceration for failure to pay a fine which is unmitigated by any effort to accommodate itself to the poverty of individual defendants, makes the real sentence a man gets depend upon the amount of money he has.

It is both appropriate and necessary that this Court develop a rationale for distinguishing between confinement of indigents for involuntary non-payment of a fine and voluntary non-payment of a fine. Imprisonment for non-payment of a fine should be relied upon only as a method of correction for individuals who are able to pay their fine and who have wilfully refused to do so. A person must be capable of paying a fine before he can be imprisoned for his "refusal" to pay it. This Court should no longer sustain holdings the effect of which permit imprisonment of defendants who are *unable* to pay. See e.g., *People* v. *Saffore,* 18 N.Y. 2d 101 (1966), 218 N.E. 2d 686, 687.

Any system which enforces the payments of fines by imprisonment clearly effects different treatment of those incarcerated depending on whether they are with or without funds to pay fines. Our courts should no longer tolerate the situation wherein two persons convicted of identical offenses, under essentially similar circumstances and upon comparable records, and sentenced to pay the same fines can walk out of court or be transported to jail depending entirely upon how much money they have. See Appellant's Jurisdictional Statement, at p. 11. Such a practice is violative of the thrust of *Griffin, supra* and *Douglas* v. *California, supra.* The equal protection guarantee calls for procedures by the state that do not permit

discrimination between persons on the basis of their ability to pay the costs of litigation. *Griffin* and *Douglas* make no distinction between intentional and unintentional forms of state discrimination. Rather, these two cases stand for the proposition that if a state perpetuates unintentional and accidental inequality affecting rights of the poor, such action will be treated no differently, for purposes of the Equal Protection Clause, than any other kind of premeditated and invidious discrimination.

States must provide the poor with the same out-of-prison opportunities to meet the costs of a fine which a monied defendant enjoys automatically. In a recent study of the Equal Protection Clause, former Justice Goldberg stated:

> ". . . 'the choice' of paying $100 fine or spending thirty days in jail is really no choice at all to the person who cannot raise $100. The resulting imprisonment is no more or no less than imprisonment for being poor, a doctrine which I trust this nation has since long outgrown." See Goldberg, Equality in Government, 39 N.Y.U. L. Rev. 205, 221 (April, 1964).

In the same article Mr. Goldberg cites *Yick Wo* v. *Hopkins,* 118 U.S. 356 (1886), at 373, for the proposition that "though the law itself be fair on its face, impartial in its appearance, yet if it is applied and administered by public authority with an evil eye and unequal hand so as practically to make unjust and illegal discriminations between persons in similar circumstances material to their rights the denial to equal protection is still within the prohibition of the Constitution."

In *People* v. *Collins,* 47 Misc.2d 210, 261 N.Y.S. 2d 970 (Orange County Ct. 1965), an indigent defendant sen-

tenced to both jail and fine argued that since he could not pay the fine portion of his sentence that it was unconstitutional to impose any further jail sentence on him because of his inability to pay the fine. The court held that since such a sentence discriminated between an indigent and a non-indigent, it violated the Equal Protection Clause. The court based its holding on two grounds: First, since the statutory purpose was to enforce payment of the fine, such a purpose was not being furthered in the case of an indigent who could not pay the fine; and second, wealthy defendants have an undue advantage in that they could avoid additional jail sentences by payment of the fine, while the indigent was incarcerated regardless of his desire to pay. The court felt that the consequences of the statute was to make an "invidious discrimination" between rich and poor even though the law was administered fairly and equally on its face.

In a case that is almost indistinguishable from the case now before this Court, *People* v. *Saffore, supra,* the indigent appellant pleaded guilty to a misdemeanor. The trial court, with full knowledge of appellant's financial condition, sentenced him to one year's imprisonment (the maximum limit of incarceration for the offense) and fined him $500 with provision that the fine, if not paid, be served out at the rate of one day's imprisonment for each dollar unpaid. The New York Court of Appeals reversed the trial court's decision holding that when the trial court is cognizant of an individual's inability to pay a fine, subsequent imprisonment in lieu of the fine resulting in imprisonment for more than the permissible maximum sentence violates the defendant's right to equal protection and due process of the law. The Court of Appeals, in *Saffore* felt that the trial court had not employed a

lawful means for enforcing payment of the fine but rather had employed an illegal method of requiring imprisonment beyond the authorized maximum term of imprisonment. The court noted that since imprisonment for failure to pay a fine can validly be used only as a means to coerce payment of a fine that it is illegal to so imprison a defendant financially unable to pay. See also *Sawyer* v. *The District of Columbia,* 238 A. 2d 314 (D.C. Ct. App. 1968) where on facts similar to *Saffore,* the court struck down as an abuse of discretion a prison-in-lieu of fine provision of a sentence imposed upon an indigent.

The appellant in the case before this Court was sentenced to 101 additional days of incarceration not because it was thought that the protection of the community or his reformation required this additional term, but simply because he was poor and unable to pay the fine imposed. The Constitution must not countenance such an invidious discrimination against the poor particularly when alternative means exist for the state to achieve its end. Courts may provide for installment payments of a fine upon establishing indigency. Recently, a United States District Court reversed a state court on equal protection grounds on its refusal to permit installment payments of a fine. The District Court ordered that the defendant be permitted ". . . to pay his fine in installments, rather than to give him no alternative but to serve a sentence to jail. In this respect, therefore, we must find that, under these peculiar circumstances [failure to provide the alternative of installment payments] there was a denial of equal protection of laws under the Fourteenth Amendment." See *Martin* v. *Erwin,* Civil No. 13084 (W.D. La., Jan. 25, 1968; Supplemental Order, Feb. 27, 1968).

We are not requesting this Court to undertake the impractical and impossible task of eradicating every disadvantage of indigency from the administration of criminal justice. Rather we ask only that imprisonment for failure to pay a fine be limited so as not to include those persons who fail to pay because they are financially unable to pay. We urge this Court to apply the principles it has expounded in *Griffin* and subsequent decisions to the precise fact situation at issue—a poor defendant sentenced to surrender 101 additional days of his freedom because of his inability to pay a fine and court costs. The appellant in this case had no choice because he was poor. He had to serve his time. On the other hand, a man of means had the choice of paying or serving.

We believe that the constitutional guarantee of equal protection of the law is not subject to a construction that allows a man of means to avoid incarceration while denying the same opportunity to an indigent. We agree with Mr. Justice Douglas that ". . . the promise of equal justice for all would be an empty phrase for the poor if the ability to obtain judicial relief were determined by the length of a person's purse." *Williams* v. *Shaffer*, 385 U.S. 1037 (1967) (Douglas, J., dissenting from denial of certiorari). Equal protection of the law should not embrace judicial procedures that permit imprisonment of indigent persons for involuntary non-payment of fines, while financially able defendants can readily buy their freedom. Just as our state courts must be open to all—rich and poor alike—so must our state courts mete out rational and purposeful punishment which reflects a policy of equality of treatment as distinguished from an alleged right.

II.

IMPRISONING A DEFENDANT FOR A PERIOD IN EXCESS OF THAT AUTHORIZED BY STATUTE SOLELY BECAUSE OF HIS FINANCIAL INABILITY TO PAY A FINE AND COSTS, ALSO IMPOSED AS A PENALTY, IS A PRACTICE WHICH IS NATIONAL IN SCOPE.

A. The laws of each of the fifty states provide for incarceration of defendants who are unable to pay fines adjudged against them.

Each of the fifty states has one or more provisions in its statutes allowing the incarceration of defendants who do not pay fines which have been adjudged against them. A survey of these statutory provisions is contained in Appendix A.

Only a handful of statutes provide that the total amount of imprisonment, composed of both a sentence to prison or jail and the term of imprisonment imposed for failure to pay the fine assessed, may not exceed the statutory maximum term of imprisonment allowed for the offense of which the defendant is convicted. California and Arizona both have incarceration statutes with this important limitation. Cal. Pen. Code Sec. 1205 (West Supp. 1968); Ariz. Rev. Stat. Ann. Sec. 13-1648 (1956). The Louisiana statute is similar for offenses for which the maximum imprisonment is six months or less. La. Crim. Pro. Code Ann. Art. 884 (Supp. 1970).

Other states attempt to mitigate the harshness of imprisonment for failure to pay fines by providing by statute a maximum term of imprisonment for this purpose, e.g., Del. Code Ann. Tit. 11, Sec. 4103 (Supp. 1968). (Maximum of one year; 90 days for justices of the peace); Fla. Stat. Ann. Sec. 775.07 (1965) (where penalty

provided is a fine only, maximum term for default is 60 days); Ill. Rev. Stat. (1969) ch. 38, Sec. 1-7(a) (maximum of six months); La. Crim. Pro. Code Ann. Art. 884 (Supp. 1970) (maximum of one year); for others see Appendix A: Maine, Mississippi, New Mexico, New York, Ohio, West Virginia and Wisconsin.

Statutes in other states provide that poor persons who do not have money or other possessions with which to pay the fine adjudged against them may be released after a specified minimum amount of time, rather than "working off" the fine at the rate of credit per day provided by statute. See, e.g. Hawaii Rev. Stat., Sec. 712-4 (1968) (30 days); Mass. Ann. Laws ch. 127, Sec. 146 (3 months); N. M. Stat. Ann. Sec. 42-2-9 (B) (1964) (3 months); for others see Appendix A: Oklahoma, Oregon, Pennsylvania. Usually, however, release under these statutes requires the taking of an oath by the prisoner that he possesses no more than an extremely minimal amount of property, see, e.g., Hawaii Rev. Stat. Sec. 712-4 (1968); or the indigent defendant may be required to undergo a certification of poverty by certain officials, see e.g., Okla. Stat. Ann. Tit. 57, Sec. 15 (1969).

The implication of these and similar statutes is that a poor person unable to pay a fine adjudged against him should not have the law requiring incarceration applied to him in all its harshness simply because he is indigent. The legislatures in the states where such laws have been enacted have declared it to be their will that those too poor to pay should be treated differently from those who refuse to pay. However, given the fact that these legislatures have progressed this far, it is somewhat difficult to understand why an indigent should be released only

after serving a minimum term (e.g., three months) for non-payment of a fine.

Apparently, the fear which prevails is that indigents, if not incarcerated for failure to pay a fine, will go unpunished for their crimes. This fear might be put to rest by instituting a scheme allowing installment payments of fines by those too poor to pay the whole amount at once. At present, this is the practice in several states, e.g., Cal. Pen. Code. Sec. 1205 (1956); Mass. Ann. Laws ch. 279, Sec. 1A (1968); Mich. Comp. Laws Ann. Sec. 769.3 (1968); Pa. Stat. Ann. Tit. 19, Sec. 953 (1964); S. C. Code Ann. Sec. 17-557 (1962); Wash. Rev. Code Sec. 9.92.070 (1961).

The A.B.A. Minimum Standards For Criminal Justice *Sentencing Alternatives and Procedures* (Approved Draft, 1968) recommends that installment payments be permitted (Sec. 2.7(b), at p. 117). It is further recommended that fines not be imposed at all in cases where the court knows that the defendant will not be able to pay them. A directly imposed jail sentence or some form of limited confinement are suggested as more appropriate solutions to the problem. (*Id.*, p. 123).

The NLADA believes that pursuant to the statutes which are on the books of all but a few states, there exists nationwide the possibility, indeed the probability, that those who are indigent and therefore cannot afford to pay the fines levied against them often will be subject to terms of imprisonment longer than the statutory maximum provided for the crimes of which these persons are convicted.

B. The number of indigent defendants incarcerated for failure to pay fines is substantial.

As of 1965, it was estimated that five million persons a year were charged with misdemeanors in the state courts. I. Silverstein, *Defense of the Poor,* 123, (1965). Although more recent statistics are not readily available, all indications are that this number has increased. For example, a comparison of judicial statistics for the municipal courts of New Jersey for the court years 1964-1965 and 1966-67 shows an increase in non-traffic offenses (which mainly consist of disorderly persons offenses and local ordinance violations from 104,196 to 114,551, an increase of nearly 10%. New Jersey Administrative Office of the Courts, *Annual Report of the Administrative Director of the Courts, 1966-1967,* (1968).

Of the large numbers of persons convicted of misdemeanors, many are sentenced to either a fine or both a fine and a jail term. Under the laws of each of the fifty states, summaries of which are contained in Appendix A, persons who are unable to pay their fines are subject to incarceration for failure to do so. That persons unable to pay fines are actually incarcerated for non-payment is indicated by a number of authorities. Some of the best known figures are those contained in Rubin, *Criminal Correction,* (1963), at page 253. A study of the Philadelphia County jail showed that 60 percent of the inmates had been committed for non-payment and in 1960 there were over 26,000 prisoners in New York City jails for default in payment of fines.

Statistics on numbers of persons incarcerated for non-payment of fines are not readily available for most states, but where they are available they indicate that the num-

bers are significant. For example, for the court year September 1, 1966 to August 31, 1967, 160,793 non-traffic, non-parking complaints were filed in the Municipal Courts of New Jersey. Of this number there were 76,036 convictions in court and pleas of guilty (not including violations bureau cases in which defendants sign a guilty plea and trial waiver). Of these 76,036 convictions and guilty pleas, 6,138 defendants were committed to jail because of non-payment of fines. New Jersey Administrative Office of the Courts, *Proceedings in the Municipal Courts, Traffic (Non-Parking), Parking and Criminal Cases) Sept. 1, 1966 to Aug. 31, 1967.*

In an attempt to obtain more recent statistics for different areas in the United States, the NLADA prepared a questionnaire to be answered by its approximately 800 Legal Aid and Defender members. This questionnaire is set out in Appendix B. The response to our questionnaire was necessarily limited because of the fact that the great majority of legal aid offices do not represent defendants in criminal cases, and that a number of defender offices, which ordinarily defend in criminal cases, do not take misdemeanor cases. The problem was further complicated by the unavailability of statistics in many offices. Nevertheless, the survey unearthed some revealing statistics concerning the numbers of persons incarcerated for failure to pay fines. These statistics are contained in Appendix C.

CONCLUSION.

For the reasons stated we respectfully submit that the judgment of the Supreme Court of Illinois in this case should be reversed.

Respectfully submitted,

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March 5, 1970

APPENDIX A

STATE STATUTORY PROVISIONS CONCERNING INCARCERATION FOR FAILURE TO PAY FINE

Alabama

If the fine is not paid defendant is imprisoned in the county jail, possibly at hard labor. The statute is so worded that defendants who have been fined differing amounts may be imprisoned for the same amount of time in satisfaction of the fine. There is no provision in the statute for payment by installment. Ala. Code Tit. 15, Sec. 341 (1958).

Alaska

The judgment that defendant pay a fine shall also direct imprisonment until the fine is satisfied. Rate of credit: $5 per day (additional $5 if prisoner works.) Alas. Stat. Sec. 12.55.010 (1962).

When an indigent defendant has been confined in prison 30 days solely for the nonpayment of the fine, the defendant may petition the magistrate for discharge if certain conditions are met. *Id.* 12.55.030.

Arizona

The sentence of fine may also direct that defendant be imprisoned until the fine is satisfied, but the imprisonment shall not extend beyond the term for which defendant might be sentenced to imprisonment for the offense of which he has been convicted. Rate of credit: $1 per day. Ariz. Rev. Ann. Sec. 13-1648 (1956).

Arkansas

If the punishment of an offense is a fine, the judgment shall direct that defendant be imprisoned until fine and

costs are paid. Rate of credit: $1 per day. Ark. Stat. Ann. Sec. 43-2315 (1964).

Specifically applying to convictions of misdemeanor and also providing for imprisonment at the rate of $1 per day. *Id.* Sec. 46-510.

Providing that confinement shall not discharge the fine which can only be collected by proceeding against the defendant's property. *Id.* Sec. 43-2606.

California

Judgment that defendant pay a fine may also direct that he be imprisoned until the fine is satisfied. Rate of credit: not less than $2 per day. When defendant is convicted of a misdemeanor, the judgment may provide for payment of the fine in installments with imprisonment in the event of default. Cal. Pen. Code Sec. 1205 (1968).

But imprisonment for nonpayment of a fine may not exceed in any case the term for which the defendant might be sentenced for the offense of which he has been convicted. *Id.*

Colorado

Court shall have power as part of its judgment to order that the offender be committed to jail until the fine is paid or otherwise legally discharged. Colo. Rev. Stat. Ann. Sec. 39-10-10 (1964).

Persons confined in jail for fines who have no estate with which to pay such fines may be discharged from imprisonment. *Id.* Sec. 39-10-9.

Connecticut

If a convict fails to pay a fine lawfully imposed, he shall be committed to jail until the fine is paid. Conn. Gen. Stat. Ann. Sec. 18-63 (1968).

Rate of credit: $3 per day. *Id.* Sec. 18-50.

When a person is convicted of a crime punishable by a fine or imprisonment, the court may impose upon the

offender a conditional sentence and order him to pay a fine within a limited time and in default of so doing, to be imprisoned. *Id.* Sec. 54-119.

Delaware

When a person is sentenced to pay a fine, the courts named in this section may order imprisonment up to one year, if no term for such nonpayment is otherwise fixed by law. Del. Code Ann. Tit. 11, Sec. 4103(a), (Supp. 1968).

In the same situation, justices of the peace and other named courts may order the person defaulting imprisoned for no longer than 90 days. *Id.* Tit. 11, Sec. 4103(b).

Florida

When a court sentences a person to pay a fine, the court shall also provide in the sentence a period of time of imprisonment in case of default. Fla. Stat. Ann. Sec. 921.14 (Supp. 1969).

In cases of convictions for misdemeanor, the court may order the defendant to serve not exceeding sixty days in default of payment of a fine. *Id.* Sec. 775.07.

Rate of credit: *Id.* Sec. 951.16.

Georgia

Fines imposed by the court shall be paid immediately or within such reasonable time as the court may grant. Ga. Code Ann. Sec. 27-2901 (1969 Supp.).

Judge may provide as a means of enforcing payment of a fine that the defendant be imprisoned until the fine is paid. *R. E. Lee* v. *State,* 118 S.E. 2d 599 (1961).

Hawaii

When a judgment to pay a fine is not satisfied by immediate payment, the offender shall be committed to prison until the judgment is satisfied. Hawaii Rev. Stat. Sec. 712-4 (1968).

A poor person, after having been confined for thirty days, solely for the nonpayment of a fine, may make application to the circuit court for the circuit in which he is imprisoned for release. The person may then be discharged upon the taking of an oath. *Id.*

Idaho

A judgment that defendant pay a fine may also direct that the defendant be imprisoned until the fine has been satisfied. Rate of credit: $5 per day. Idaho Code Ann. Sec. 19-2517 (1969 Supp.).

Substantially the same is provided, for both felonies and misdemeanors, by *Id.* Sec. 18-303.

Illinois

In a judgment imposing a fine, the court may order that upon nonpayment of the fine the offender may be imprisoned. Rate of credit: $5 per day. But no person may be imprisoned in this fashion for longer than six months. Ill. Rev. Stat. (1969) ch. 38, Sec. 1-7(k).

If a person confined in jail for failure to pay a fine has no estate with which to pay the fine, the court may release that person. *Id.* ch. 38, Sec. 180-6.

Indiana

Whenever a person is fined for a felony or a misdemeanor, the judgment shall be that he is committed until the fine is paid. Ind. Ann. Stat. Sec. 9-2228 (1956).

Rate of credit: $5 per day. *Id.* Sec. 9-2227a (Supp. 1969).

Iowa

The judgment that defendant pay a fine may also direct that he be imprisoned until the fine is satisfied. Iowa Code Ann. Sec. 762.32 (1950).

Rate of credit: $3⅓ per day. *Id.* Sec. 789.17.

(Appendix)

Kansas

Defendant to be ordered committed to county jail until fine is paid. Kan. Gen. Stat. Ann. Sec. 62-1513 (1964).

Rate of credit: $2 per day. *Id.* Sec. 62-2109.

A person imprisoned for failure to pay a fine may be discharged from imprisonment if found to be unable to pay. *Id.* Sec. 62-1515.

Kentucky

Judgment shall be rendered directing that the defendant shall work at hard labor until the fine and costs are satisfied. Ky. Rev. Stat. Sec. 431.140 (1969).

Rate of credit: $2 per day. *Id.*

Louisiana

If a fine is imposed, the sentence shall provide that in default the defendant shall be imprisoned for a specified period not to exceed one year. But: where the maximum prison sentence which may be imposed as a penalty for a misdemeanor is six months or less, the total period of imprisonment upon conviction of the offense, including imprisonment for default, shall not exceed six months for that offense. La. Crim. Pro. Code Ann. Art. 884 (1970 Pocket part).

Maine

Convict sentenced to pay fine may be committed or confined for default thereof, but not longer than 11 months for any single fine. Me. Rev. State Ann. Tit. 15, Sec. 1904 (Supp. 1970).

Rate of credit: $5 per day. *Id.*

Maryland

In default of payment of a fine, a person adjudged guilty shall be committed to jail until discharged by due course of law. Md. Ann. Code Art. 38, Sec. 1 (1965).

Installment payments in some counties are provided for. *Id.* Art. 52, Sec. 18 (1969 Supp.).

Rate of credit: $2 per day (with some modifications resulting in shorter periods of confinement in some cases than would result at $2 per day). *Id.* Art. 38, Sec. 4 (1969 Supp.).

Massachusetts

When a person convicted is sentenced to pay a fine, he may also be sentenced to be committed until it is paid. Mass. Ann. Laws, ch. 279, Sec. 1; ch. 127, Sec. 144 (1969).

Rate of credit: $1 per day. *Id.* ch. 127, Sec. 144.

The execution of the sentence of confinement may be suspended and the defendant placed on probation on condition that he pay the fine within a certain time, either in one payment or in installments. In case of default, the court may revoke the suspension of the execution of the sentence. *Id.* ch. 279, Sec. 1.

Discharge of poor prisoners incarcerated for failure to pay fines. *Id.* ch. 127, Sec. 145, (when fine is less than ten dollars); Sec. 146, (when the prisoner has been confined for three months).

Michigan

The court may impose upon the offender a conditional sentence and order him to pay a fine within a limited time and in default of so doing to be imprisoned. The court may also place the offender on probation with a condition that he pay a fine in installments and in default of such payments be imprisoned. Mich. Comp. Laws Ann. Sec. 769.3 (1968).

Execution may issue for the collection of fines in cases where no alternative sentence or judgment of imprisonment has been rendered, but no one may be imprisoned under such execution for longer than 90 days. *Id.* Sec. 600.4815.

(Appendix)

Minnesota

If a defendant's fine exceeds the amount of his bail, the defendant shall be committed until the balance is paid. Minn. Stat. Ann. Sec. 629.53 (1947).

Rate of credit: $3 per day. *Id.* Sec. 641.10 (Supp. 1969).

Mississippi

Convicts to be imprisoned until fine is fully paid. However, no convict may be held for more than two years for failure to pay the fine for any one offense. Miss. Code Ann. Sec. 7899 (1957).

Rate of credit: $3 per day. *Id.* Sec. 7906.

Missouri

When a defendant is sentenced to pay a fine, he shall be imprisoned until the sentence is fully complied with. Mo. Ann. Stat. Sec. 546.830 (1953).

The judge, on petition of the prisoner, may sentence him to imprisonment for a limited time in lieu of the fine. *Id.* Sec. 546.840.

Rate of credit: $2 per day. *Id.* Sec. 551.010.

Magistrates' courts have similar powers but the rate of credit may vary from $2 to $10 for each day of confinement. *Id.* Secs. 543.260 and 543.270.

Montana

The judgment may be for fine and imprisonment until the fine is paid. Mont. Rev. Codes Ann. Sec. 95-3202(b) (1969).

Rate of credit: $10 per day. *Id.*

Nebraska

In cases where courts or magistrates have power to sentence an offender to pay a fine, those courts or magistrates may make it a part of the sentence that the party

be committed until the fine is paid. Neb. Rev. Stat. Sec. 29-2206 (1965).

Rate of credit: $6 per day. *Id.* Sec. 29-2412.

In cases of misdemeanor, offenders may be committed to the county jail until the fine is paid. *Id.* Sec. 29-2404.

Nevada

A person sentenced to pay a fine may be confined until the fine is satisfied. Nev. Rev. Stat. Sec. 176.065 (1967).

Rate of credit: $4 per day. *Id.*

New Hampshire

A person sentenced to pay a fine shall be ordered to be imprisoned until sentence is performed. N. H. Rev. Stat. Ann. Sec. 618.6 (1969 Supp.).

Rate of credit: $5 per day. *Id.* Sec. 6f8.9.

New Jersey

Defendant may be placed at labor in a county jail or penitentiary until the fine is paid. N. J. Stat. Ann. Sec. 2A:166-14 (1953).

Defendant may also be permitted to remain at large for a fixed time to enable him to pay the fine. If defendant fails to pay, the court may then order him into custody. *Id.* Sec. 2A:166-15.

Rate of credit: $5 per day. *Id.* Sec. 2A:166-16 (Supp. 1969).

A disorderly peron who defaults in the payment of a fine may be committed by the court. *Id.* Sec. 2A:169-5 (Supp. 1969).

New Mexico

A person may be committed to prison for nonpayment of a fine. N. M. Stat. Ann. Sec. 42-2-9 (Supp. 1969). (Applies to both county jails and the state penitentiary—Compiler's Note).

Rate of credit: $5 per day. *Id.*

If a person so confined makes an affidavit that he has no property out of which to pay the fine, he must be released after three months of confinement. *Id.* sub. B.

But convicts sentenced to the state penitentiary may not be required to serve more than thirty days for a fine. *Id.* Sec. 42-1-60 (1964).

New York

In the event the defendant fails to pay a fine as directed, the court may direct that he be imprisoned until the fine is satisfied (limitations: for a felony, the imprisonment may not exceed one year; for a misdemeanor, it may not exceed one third of the maximum authorized sentence.) N. Y. Code Crim. Proc. Sec. 470-d (Supp. 1969).

Sec. 470-d has been limited by *People* v. *Saffore,* 18 N.Y. 2d 101, 218 N.E. 2d 686 (1966), discussed in the body of this brief.

North Carolina

If a guilty party is sentenced to pay a fine and it is not immediately paid, the guilty person may be committed to the county jail until the fine is paid. N. C. Gen. Stat. Sec. 6-65 (Supp. 1970).

Persons committed for fines may be discharged from imprisonment upon taking an insolvent debtor's oath. *Id.* Secs. 23-23 and 23-24 (1965).

North Dakota

A judgment that the defendant pay a fine also may direct that he be imprisoned until the fine is satisfied. N. D. Cent. Code Sec. 29-26-21 (1960).

Rate of credit: $2 per day (but such imprisonment does not discharge the judgment for the fine.) *Id.*

(Appendix)

Ohio

When a fine is the whole or part of a sentence, the court or magistrate may order that the person sentenced remain in jail until the fine is paid but no commitment may exceed six months. Ohio Rev. Code Ann. Sec. 2947.14 (1964).

Rate of credit: $3 per day. *Id.*

In a case of conviction for a misdemeanor, the judge or magistrate has the same power as above, but there is no limit of six months. *Id.* Sec. 2947.20.

Oklahoma

Persons sentenced to pay a fine who refuse or fail to pay it, may be imprisoned. Okla. Stat. Tit. 11, Sec. 794 (Supp. 1969).

Rate of credit: $2 per day. *Id.*

A poor convict who has been imprisoned for nonpayment of a fine may be discharged after serving six months if two justices of the peace are satisfied that the convict has not had since his conviction any estate with which he might have paid the fine. *Id.* Tit. 57, Sec. 15 (1969).

Oregon

A judgment that the defendant pay a fine shall also direct that he be imprisoned in the county jail until the fine is satisfied. Ore. Rev. Stat. Sec. 137.150 (1963).

Rate of credit: $5 per day. *Id.*

Indigents imprisoned for nonpayment of fine may be discharged after serving thirty days solely for such nonpayment if in the opinion of a magistrate or court it appears that the prisoner is unable to pay the fine. Ore. Rev. Stat. Sec. 169.160 (1967).

(Appendix)

Pennsylvania

Persons may be imprisoned in an action for fines of penalties. Pa. Stat. Ann. Tit. 12, Sec. 257 (1953). A person confined for nonpayment of a fine may be discharged if he conforms to the provisions for insolvent debtors, but no application is allowed until the prisoner has served at least three months. *Id.* Tit. 39, Sec. 323 (1954).

The sentencing authority may allow payment of a fine by installments, but upon default the defendant may be committed. *Id.* Tit. 19, Secs. 953 and 956 (1964).

Rhode Island

Persons may be committed to the adult correctional institutions for the nonpayment of fines. R. I. Gen. Laws Ann. Sec. 13-2-36 (1957).

Rate of credit: $5 per day. *Id.*

The director of social welfare may recommend the release of persons so confined, but no guidelines are set out in the statute. *Id.*

South Carolina

Offenders may be committed to jail, if they are unable to pay forfeitures, until the amount is satisfied. S. C. Code Ann. Sec. 17-574 (1962).

Offenders so committed are entitled to the privilege of insolvent debtors. *Id.*

Installment payments as a condition of probation. *Id.* Sec. 55-593.

South Dakota

A judgment that the offender pay a fine may also direct that he be imprisoned until the fine is satisfied. S. D. Comp. Laws Ann. Sec. 23-48-23 (1969).

Rate of credit: $2 per day. *Id.*

(Appendix)

Tennessee

If a fine is not paid, the defendant shall be imprisoned until it is paid. Tenn. Code Ann. Sec. 40-3203 (1955).

Rate of credit: $5 per day. *Id.* Sec. 41-1223 (1956).

Texas

When a defendant convicted of a misdemeanor is unable to pay the fine adjudged against him, he may be put to work or imprisoned for a sufficient length of time to discharge the amount. Tex. Code Crim. Proc. Art. 43.09 (1966).

Utah

A judgment that a defendant pay a fine may also direct that he be imprisoned until the fine is satisfied. Utah Code Ann. Sec. 77-35-15 (1953).

Rate of credit: $2 per day. *Id.*

Vermont

When a person is sentenced to imprisonment and also to pay a fine, the court may order him imprisoned for failure to pay the fine, the term of imprisonment to begin at the end of the term in the original sentence. Vt. Stat. Ann. Tit. 13, Sec. 7222 (Supp. 1969).

When a person is sentenced only to pay a fine, the court shall order that if the sentence is not complied with within twenty-four hours the person may be imprisoned. *Id.* Sec. 7223.

Rate of credit: $1 per day. *Id.* Secs. 7222 and 7223.

Virginia

The circuit or corporation court in which any judgment for a fine is rendered may commit the defendant to jail until the fine is paid. Va. Code Ann. Sec. 19.1-339 (Supp. 1963).

In any misdemeanor case tried before a court not of record in which a fine is imposed on a defendant, if no security is given, the defendant may be committed to jail until the fine is paid. *Id.* Sec. 19.1-338.

Washington

If a person does not pay the fine adjudged against him within five days, that person may be imprisoned in the county jail until the fine is paid. Wash. Rev. Code Ann. Sec. 10.82.030 (Supp. 1969).

Installment payments permitted. *Id.* (1961).

West Virginia

When a judgment for a fine is rendered by a court of record having jurisdiction in criminal cases, the court may also provide, as a part of the judgment, that the defendant be imprisoned until the fine is paid. W. Va. Code Ann. Sec. 62-4-9 (1966).

Rate of credit: $1.50 per day. *Id.* Sec. 62-4-10.

Confinement for failure to pay a fine shall not exceed the term of six months. *Id.*

Wisconsin

When a fine is imposed, the court shall also sentence the defendant to be committed to the county jail until the fine and costs are paid or discharged. Wis. Stat. Ann. Sec. 959.055 (Supp. 1969).

The court may grant a reasonable time not exceeding one stay of 30 days based on the defendant's circumstances in which to make payment before committing him to the county jail. *Id.*

The time of imprisonment, in addition to any other imprisonment, shall not exceed six months. *Id.*

Installment payments permitted. *Id.* Sec. 57.04.

(Appendix)

Wyoming

Any court shall have power, in cases of conviction where a fine is inflicted, to order as part of its judgment that the offender shall be committed to jail until the fine is paid or otherwise legally discharged. Wyo. Stat. Ann. Sec. 7-280 (1959).

Rate of credit: $1 per day. *Id.* Sec. 6-8.

APPENDIX B

MISDEMEANOR FINE VS. IMPRISONMENT QUESTIONNAIRE

We would appreciate your prompt return of the questionnaire in the enclosed reply envelope. If a question calls for an answer for which you do not have exact data please give an estimate or approximation and *indicate the latter in your answer.* If any printed materials on this subject are available from your office please enclose copies.

1. Name and address of your office .....

.....

Person in charge .....

Person reporting ..... Date .....

2. Does your state law allow persons adjudged guilty of committing a misdemeanor to be imprisoned for nonpayment of fines imposed by the court? Yes ..... No .....

Citation and/or title .....

3. How many indigent misdemeanants were represented by your public defender program from 1/1/69 to 1/1/70?

(a) Not ascertainable ..... (b) Per week .....

(c) Per month ..... (d) 1969 Total .....

4. How many of the total number given in answer 3(d) received:

(a) only a jail sentence as punishment for the offense?
Total no. ..... Per cent ..... %

(b) only a fine as punishment for the offense?
Total no. ..... Per cent ..... %

(c) both a jail sentence and a fine?
Total no. ..... Per cent ..... %

(Appendix)

5. How many of the indigent misdemeanants who received fines were then imprisoned:

(a) because of their *inability* to pay the fine?
Total no. ..... Per cent ..... %

(b) because of their *refusal* to pay the fine?
Total no. ..... Per cent ..... %

6. Does either statute or judicial precedent forbid imprisonment for nonpayment of a fine from exceeding the maximum jail sentence for misdemeanors?

Yes ..... No ..... Not ascertainable .....

7. Are indigent misdemeanants also imprisoned because of their inability to pay court costs and fees?

Yes ..... No ..... Not ascertainable .....

8. Do you feel imprisonment of an indigent misdemeanant for nonpayment of a fine can be justified?

Yes ..... No ..... Not ascertainable .....

Why? .....

.....

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.....

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APPENDIX C

SELECTED RESULTS OF MISDEMEANOR FINE VS. IMPRISONMENT QUESTIONNAIRE

Name and Location of Office	Number of Misdemeanants Represented (1969)	Number of clients receiving a fine or a fine and jail sentence	Number of clients who received fines imprisoned for failure to pay the fine
1. Office of the Public Defender, DuPage County, Illinois	442		25% (est.)
2. Office of the Public Defender, LaSalle County, Illinois	400	320 (80%)	40 (16%)
3. Scioto County Legal Aid Assn., New Boston, Ohio	100 (approx.)	(100%)	(100%)
4. Yellowstone County Legal Services, Billings, Montana	75	60 (80%)	10 (16%)
5. Dinebeiina Nahiilna Be Agaditahe, Shiprock, New Mexico	150 (approx.)	147 (98%)	90 (60%)
6. Western Idaho Legal Aid, Caldwell, Idaho	24 (approx.)	24 (100%)	6 (25%)
7. Allen County Legal Services Assn., Lima, Ohio (only represents misdemeants in special circumstances)	6	4 (67%)	2 (50%)
8. Crow Creek and Lower Brule Legal Services, Ft. Thompson, South Dakota	175 (Aug.-Dec. 1969)	(100%)	(50%)
9. Legal Services Program, Greenup, Kentucky	30 (approx.)	(40%)	(50%)
10. Leech Lake Reservation Legal Services Project, Cass Lake Minnesota	250 (approx.)	(14%)	(10%)
11. Legal Aid Society of Calhoun County, Battle Creek, Michigan	24	24 (100%)	18 (75%)
12. Peterson and Lonergan, Ukiah, California	200 (approx.)	(75%)	(35%)
13. Tri-County Legal Services, Littleton, New Hampshire	33 (last four months of 1969)	13 (39%)	2 (15%)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1089

WILLIE E. WILLIAMS,

Appellant,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Appellee.

On Appeal From the Supreme Court of Illinois

BRIEF FOR THE APPELLEE

SUMMARY OF ARGUMENT

Illinois has adopted §1-7 (k) of the Criminal Code to provide a means whereby those persons convicted of a crime and punished by imposition of a fine, who refuse to, or cannot pay, may "work off" the fine at the rate of $5 a day while incarcerated in a jail.

Since the state of Illinois has a legitimate interest in the deterrence of crime, and the collection of the revenues which the imposition of fines produce, and since employment of the "work off" system is a rational means to effectuate this state policy, the system does not violate the Equal Protection Clause under traditional tests. The same result follows even if the test includes the element of "balancing" the advantages gained by society in the use of the system against the disadvantages to the indigent who cannot pay a fine, because the extension of the rational of *Griffin* v. *Illinois,* 351 U.S. 12 (1956) to the post-adjudication stage of fine and punishment would gravely threaten the societal interests involved not only in this area of the law, but in others, such as the bail system, as well.

INTRODUCTION

This case involves the question whether Appellant, convicted of the crime of theft and sentenced to a year in jail plus a fine of $500 and $5 costs, was denied equal protection of the laws when the State of Illinois, under §1-7(k) of the Criminal Code, sought to collect the fine and costs by incarcerating Appellant, an indigent person, until the sum of $505 was "worked off" at the rate of $5 a day.

The Brief of Appellant plunges almost immediately into an argument which "has indeed a captivating sound; it strikes the passions with a winning address."[1] The spectre of the poor man denied justice while the rich man escapes by reaching into his pocket is not only raised, but paraded, as Appellant claims deprivation "of the things that make life worth living while the man with $505 is burdened with a necessary inconvenience" (Br. 14); "subversion" of the equal protection clause (Br. 17); punishment "simply because he is an able-bodied poor person without savings" (Br. 19); and "invidious discrimination against the poor" (Br. 20).

However, bold claims of violations of fundamental constitutional protections cannot carry the case, nor should they. Equal justice for all is the lifeblood of the American judicial system; without its promise and its realization the system will die. But even the advancement of such a fundamental proposition, as this Court has recently recognized, must be considered in the context of the case.[2] And it is the *context* of this case which Appellant forgets. He recognizes not at all, or insufficiently, five important interests which surround the law of the state of Illinois alleged to conflict with the Equal Protection Clause of the Fourteenth Amendment.

First, §1-7(k) of the Illinois Criminal Code, as a deliberate expression of policy by the General Assembly of Illinois in an area—the administration of criminal justice—peculiarly within the province of the states, comes to this

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1. Millar v. Taylor (1769) 4 Burr. 2303, 2359.

2. *Cf.* Illinois v. Allen, —— U.S. —— (1970) (*concurring opinion* of Mr. Justice Brennan, 2).

Court "with a strong presumption of regularity and constitutionality."[3]

Second, the validity of incarceration to "work off" fines which are not paid has been at least implicitly recognized by this Court. See *Ex Parte Jackson*, 96 U.S. 727 (1877); *Hill* v. *Wampler*, 298 U.S. 460 (1936).[4]

Third, the history of incarceration for failure to pay a fine imposed as punishment for a criminal offense is an ancient one, dating from 12th century England.[5] While the antiquity of a practice does not, of course, insulate it from attack on constitutional grounds, steadfast legislative and judicial adherence to such a practice through the centuries is certainly relevant in assessing its legitimacy in a consti-

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3. Swann v. Adams, 385 U.S. 440, 447 (1967) (*dissenting opinion* of Mr. Justice Harlan); Salsburg v. Maryland, 346 U.S. 545, 553 (1954); Atchison, T. & S. F. R. Co. v. Matthews, 174 U.S. 96, 104 (1899).

4. Appellant attempts to avoid the force of these decisions by arguing that the equal protection claim was not raised in either case (Br. 24, ft. 20). But it has been asserted that nothing in Griffin v. Illinois, 351 U.S. 12 (1956) deprives these cases of their authority as precedent on the point. See Wildeblood v. United States, 284 F. 2d 592, 598 (D. C. Cir., 1960). The continuing vitality of the practice of incarceration in lieu of payment of fines has also been upheld by other post-*Griffin* opinions. Kelly v. Schoonfield, 285 F. Supp. 732 (Md., 1968); Winters v. Beck, 281 F. Supp. 801 (E. D. Ark., 1968); United States ex rel Privitera v. Kross, 239 F. Supp. 118 (S.D. N.Y.), aff'd., 345 F. 2d 533 (2d Cir., 1965), cert. den., 382 U.S. 911 (1965); Henderson v. United States, 189 A. 2d 132 (D.C. App., 1963). See also Cohen v. State, 173 Md. 216, 195 A. 532 (1937); Ex Parte Garrison, 297 F. 509 (S.D. Cal., 1924).

5. 2 HOLDSWORTH, A HISTORY OF ENGLAND, 43, 44, 46 (3rd ed. 1923). At common law, a fine could be imposed for a

tutional sense. *Kotch* v. *Board of River Port Pilot Commissioners,* 330 U.S. 552, 557-62 (1947); *McGowan* v. *Maryland,* 366 U.S. 420, 431-49 (1961); *McGowan* v. *Maryland,* 366 U.S. 459, 460-511 (1961) (*concurring opinion* of Mr. Justice Frankfurter); *Roth* v. *United States,* 354 U.S. 476, 482-84 (1957).

Fourth, the laws of all 50 states and the federal government *today* allow the incarceration of the indigent to

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misdemeanor either in substitution for or in addition to imprisonment. BISHOP ON CRIMINAL LAW, §940, p. 693 (9th ed. 1923). It was limited only by the prohibition of excessive fines contained in the Magna Carta and the Bill of Rights. HARRIS & WILSHERE, PRINCIPLES AND PRACTICES OF THE CRIMINAL LAW, p. 481 (London, 1936). Payment of the fine was enforced by imprisonment or by the writ of distress, or in default of distress, by imprisonment. HARRIS & WILSHERE, 559; RUSSELL ON CRIMES AND MISDEMEANORS, Vol. I, p. 217 (8th ed. 1923); 61 and 62 Vict., c. 41, §9. This procedure subsequently has been regulated by the Criminal Justice Act of 1948, [11 and 12 Geo. 6, c. 58, §14 (1) (c)]. In Regina v. Carver [1955] 1 All. E. R. 413, the Court of Criminal Appeal held that it was within the discretion of the trial court to imprison a defendant for nonpayment of a fine after he had served the maximum jail term for the offense of which he stood convicted.

Through one or both of these methods, the state was able to satisfy payment of the fine. Thus, a penalty not paid in money fell upon the person of the defendant to be discharged through labor. 1 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, §380, p. 449 (Haar, 1962); MAITLAND AND MONTAGUE, A SKETCH OF ENGLISH LEGAL HISTORY, pp. 19-21 (London 1915).

collect in labor that which the state cannot collect in money.[6]

The Illinois statute enforces payment of a fine by imprisonment of non-paying defendants to work off the amount due at the rate of $5 a day for a period not to exceed six months. The provisions of the other states and of the federal government vary from the Illinois statute in three significant ways—the per diem rate at which the non-paying defendant is required to work out his fine, the maximum period for which he can be incarcerated for non-payment, and the type of work provided the defendant while incarcerated. Of the fifty states, only two—Nebraska[7] and Montana[8]—have a higher per diem rate than Illinois. In addition, ten states have adopted the same $5 a day rate as Illinois.[9]

Twelve states have established a limitation on the amount of time for which a defendant may be imprisoned for non-payment.[10] Although the amount of time required

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6. Brief of the National Legal Aid and Defender Association as *Amicus Curiae* in the instant Case, Appendix A, and Title 18 U.S.C. §3565 (1964).

7. NEB. REV. STAT. § 29-2412 (1965) provides a $6 a day credit.

8. MONT. REV. CODE ANN. § 95-3202 (b) (1969) provides a $10 a day credit.

9. Alaska, Idaho, Illinois, Indiana, Maine, New Hampshire, New Jersey, New Mexico, Oregon, Rhode Island, Tennessee.

10. Arizona, California, Delaware, Florida, Louisiana, Maine, Michigan, Mississippi, New York, Ohio, West Virginia, and Wisconsin.

to be served varies from a prohibition of any imprisonment beyond the maximum term of imprisonment provided for the substantive offense[11] to a blanket provision allowing imprisonment until the total amount of the fine is discharged,[12] the Illinois statute limits imprisonment for nonpayment to six months. The federal statute provides a 30 day minimum period of incarceration before a defendant may be released on a pauper's oath under the provision of Title 18 U.S.C. §3569, reflecting the general legislative determination that while the period of incarceration for nonpayment should be limited, a minimum period of service should be required.[13] Only Illinois and Maine have provided both a $5 a day rate and a limitation upon the length of imprisonment of the defendant.[14]

The unanimity of the states and the federal government revealed by this survey of current practices in the administration of criminal justice demonstrates, at the least, a *legislative* determination that such laws do not violate the Equal Protection Clause, a determination which, while not controlling, this Court cannot, and should not, ignore in weighing the validity of Appellant's argument. *Tigner* v. *Texas,* 310 U.S. 141, 145-46 (1940); *Roth* v. *United States,* 354 U.S. 476, 485 (1957). The singlehanded striking down of the laws of all states and the federal government—a result compelled by accession to the argument of Appellant

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11. Arizona.

12. Arkansas.

13. Such provisions protect the defendant from the peril of "perpetual imprisonment," Lee v. State, 118 S.E. 2d 599 (Ga. 1962), while satisfying the state's interest in enforcement of its penal sanctions.

14. Maine's limitation on imprisonment is eleven months.

—would be an assertion of power so far reaching and consequential that it ought to be approached with the utmost caution and only for the most demanding of constitutional requirements.[15]

Fifth, the interest of the states in the practice under review in this case is a most important one:

> "Although it has been estimated that fines constitute 75% of all sentences, there are no comprehensive statistical compilations to buttress the estimate. *** *Judicial Criminal Statistics* for 1936 show that fines without imprisonment constituted 21.1% of all sentences in thirty states and 5.8% of all sentences for fifteen major offenses in the same area. *** Of 1,069,929 defendants found guilty of summary offenses and misde-

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15. The impact of a decision voiding §1-7(k) of the Illinois Criminal Code is suggested by the *Commentary* to the A.B.A. Minimum Standards on Sentencing Alternatives and Procedures (Tent. Draft., pp. 119-20) (1967):

> A large percentage of those committed to local institutions have been imprisoned solely for the reason that they cannot pay a fine to which they have been sentenced. The President's Crime Commission, for example, cited a recent study of the Philadelphia County Jail which showed that sixty per cent of the inmates had been committed for nonpayment of a fine. See PRESIDENT'S COMM'N, THE COURTS 18. Another example is provided by the background research of the District of Columbia Crime Commission. The Commission examined the sentences imposed on a sample of 1183 offenders in the U.S. Branch of the Court of General Sessions. Nineteen per cent (222) of the sample were fined, and forty-seven per cent (105) of those fined were imprisoned for nonpayment. See REPORT OF THE PRESIDENT'S COMMISSION ON CRIME IN THE DISTRICT OF COLUMBIA 394 (1966).

> meanors in magistrates' courts in New York City in 1950, 994,036 or 92.9% were sentenced to fine only. ***The Court of Special Sessions in the same city imposed a fine as sole punishment in 47.5% of the general misdemeanor cases. ***That fines do produce considerable revenues is demonstrated by the amount of dollars collected annually in different jurisdictions."[16]

It is fair to say that many of the local courts across the country are supported almost entirely by revenue derived from the imposition of fines and costs in misdemeanor cases, especially traffic offenses. A holding that incarceration to "work off" a fine violates the Equal Protection Clause would jeopardize the ability of these courts to function, would lessen the deterrent value of the laws which they enforce and would potentially saddle them with thousands of claims of indigency, both genuine and spurious, which would have to be heard after prior litigation had established the guilt of the defendant and the necessity for the imposition of fines as punishment.

With these considerations in mind, we turn to an examination of Appellant's argument on the merits.

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16. *Note, Fines and Fining—An Evaluation,* 101 U. Pa. L. Rev. 1013, 1014, 1016, 1026 (1953).

ARGUMENT

THE ILLINOIS STATUTE COMPELLING AN INDIGENT DEFENDANT TO "WORK OFF" A FINE IMPOSED AFTER CONVICTION DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE BECAUSE IT RATIONALLY RELATES TO LEGITIMATE STATE ENDS WITHOUT UNNECESSARY DISCRIMINATION AGAINST THE INDIGENT.

Under the umbrella of the Equal Protection Clause of the Fourteenth Amendment, Appellant has gathered two attacks upon the validity of §1-7(k) of the Illinois Criminal Code. These are:

> (1) the statute denies equal protection of the laws because it unnecessarily discriminates against the poor without a counter-balancing, rational relationship to some legitimate state interest, that is to say, since alternative means exist to exact the payment of a fine from the poor, the state of Illinois is forbidden to employ one which carries with it the impact of incarceration under the "work-off" system (Br. 16-22);
>
> (2) the statute denies equal protection of the laws because in this case it authorizes a total period of imprisonment of 466 days for the indigent appellant while a maximum period of 365 days would be authorized for a man of means (Br. 27-29).[17]

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17. We do not reach this argument because if we are correct in our assertion that Appellant's incarceration to "work-off" the fine does not violate the Equal Protection Clause under traditional tests, then it cannot be successfully argued that the additional incarceration is the equivalent of a "sentence" of 101 days under that portion of the theft statute which contemplates imprisonment as a punishment.

Appellant says:

> ". . . the Illinois practice does not satisfy the Fourteenth Amendment because the state has available to it collection devices far less subversive of equal protection than imprisonment" (Br. 17).

As we understand it, this branch of Appellant's equal protection argument may be simply stated:

> (1) the state of Illinois has adopted a device for the collection of fines from the "indigent" by compelling them to be "worked-off" in jail at the rate of $5 a day;
>
> (2) while the collection of revenue is a legitimate state goal, means other than the "work-off" system exist to collect fines levied on the indigent;
>
> (3) these alternatives, while perhaps administratively more burdensome to the state, have a lesser impact on the poor;
>
> (4) the state is therefore compelled to adopt the alternatives since failure to do so will void the "work-off" statute on the equal protection ground that it unnecessarily discriminates against the poor.

While this argument has a seeming surface plausibility and undeniable popular appeal, it plainly runs counter to the whole course of this Court's decisions in the explication of the range of protection accorded by the Equal Protection Clause.

Appellant's fundamental error is in his assumption that the existence of what are, to him, more desirable or benign alternatives to the "work-off" system constitutionally compel the adoption of those alternatives by the state of Illinois. To the contrary, as this Court has made clear time and again, the existence of a rational relationship between

the end sought to be achieved, a legitimate state interest in that end, and the means used to achieve it, is sufficient to save a statute from attack under the Equal Protection Clause even though other means may also exist to achieve the same end, and even though this Court could be persuaded that the alternative means are wiser, fairer or more nearly in accord with advancing notions of criminal justice reform.

The guiding principles to decision in cases involving challenges to legislation under the Equal Protection Clause have been stated many times by this Court. "Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan* v. *Maryland*, 366 U.S. 420, 425-26 (1961). "The equality at which the 'equal protection' clause aims is not a disembodied equality. The Fourteenth Amendment enjoins the 'equal protection of the laws,' and laws are not abstract propositions . . . but are expressions of policy arising out of specific difficulties, addressed to the attainment of specific ends by the use of specific remedies." *Tigner* v. *Texas*, 310 U.S. 141, 147 (1940). "[T]he constitutional demand is not a demand that a statute necessarily apply equally to all persons. ***Hence, legislation may impose special bur-

dens upon defined classes in order to achieve permissible ends." *Rinaldi* v. *Yeager*, 384 U.S. 305, 309 (1966).

Under these principles, the first question to be decided is what state interests are involved in this case. Illinois, like all other states and the federal government, seeks to deter crime and punish offenders by defining criminal offenses and imposing, in some cases, fines as punishment after conviction. To say these are important state interests is to state the obvious.

The imposition of fines, however, will not serve their deterrent purpose if they are not collected, or are, under the state's scheme, uncollectable, whether by virtue of fault in legislation or by the conflict of state policy with the federal constitution. It follows, therefore, that the adoption of a law to compel the payment of fines by incarcerating those unwilling or unable to pay until they are "worked off" at a specified rate is not irrational nor discriminatory under the Equal Protection Clause if it can be shown that the interests of the state in deterring crime and collecting the revenue derived from fines are achieved by this means.[18]

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18. Nowhere in his Brief does Appellant directly dispute the proposition that the state of Illinois has essential interests at stake in the deterrence of crime by the imposition of fines and the concurrent need to enforce such deterrence, and enhance the revenue of the state by the collection of the fines or their equivalents in labor. Indeed, the validity of such interests is implicitly conceded by Appellant's extended argument concerning the wide range of choices supposedly available to Illinois to accomplish these ends without incarceration, the evils of which Appellant attempts to magnify by references to the "deplorable condition" of short term detention facilities in Illinois, which are characterized as "the lowest form of social institution on the American scene." Reference is also made to a survey

But, argues Appellant, Illinois may achieve the same ends by employing other methods of collecting the fine, none of which involve the incarceration of the defendant unable to pay immediately. It is suggested that levying against a defendant's real and personal property or pro-

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published in a Chicago newspaper which alleges that "the overwhelming majority of all Illinois jail inmates are almost completely idle" (Br. 14, ft. 9).

We assume that these references are designed to quarrel, at least subtly, with the proposition we have advanced above, i.e., that valid interests are served by the incarceration of indigents under the work-off system. But these attacks upon the operation of the work-off system are not supported by the record in this case, and, indeed, nothing in the record of this case militates against the reasonable assumption that Illinois, and other states, would not continue to employ a practice for the collection of revenue which did not, in fact, collect that revenue or its equivalent in labor. The experience in Chicago, Illinois, is revealing in this regard.

The House of Correction Jail Facility in Cook County, Illinois, houses about 1500 inmates, including those awaiting trial on criminal charges and those serving minor sentences. Between 175 and 200 of these inmates are incarcerated for non-payment of a fine. (There are no figures available on what percentage of these defendants wilfully refuse to pay their fine). They are segregated from the general prison population of the cell houses but not from those inmates who are serving minor sentences and with whom they are housed in the dormitories. Any further segregation is not feasible within the present penal system.

The House of Correction has an established work program through which it extracts in labor the value of a criminal fine from those who are unwilling or unable to pay. Under the program, non-paying defendants are assigned to jobs in the salvage yard, on the "tree project"

viding for installment payments or imposing "on an indigent a parole requirement that he do specified work during the day to satisfy the fine" are realistic alternatives. "Finally," it is said, "to the extent a defendant is unable to find work himself, the state through public employment services or public works programs is certainly bound to attempt to find it for him before remitting him to incarceration" (Br. 20-21).

Perhaps these are realistic alternatives; perhaps not. Perhaps their employment in the criminal justice system of Illinois would signal a wiser, fairer administration of the penal laws; perhaps not. The point which Appellant continues to miss is that given a rational relationship between the ends sought to be achieved by the state and the system chosen to accomplish those ends (in this case, the deterrence of crime by the imposition of fines and the collection of those fines from the indigent by the "work-off" system) the *Equal Protection Clause does not compel the state of Illinois to adopt alternatives which he, or the*

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or in the laundry or maintenance departments—all within the jail. The defendants average six or more hours of labor per day and work between five and seven days per week. The cost to the State of keeping these men (computed on a 24 hour basis) was $6.61 per day in 1969 (an increase from $6.33 per day in 1968). Although exact figures are not available, the value of the labor done by these inmates on a per diem basis is at least $11.51—the sum of the cost to the state of their upkeep and the $5.00 by which the amount of their fine is diminished per day. Illinois could not replace this labor force except at a greater cost to the State. (Letter from Daniel Weil, Acting Executive Director, Cook County Department of Corrections to James R. Thompson, Assistant Attorney General of the State of Illinois and one of the Attorneys for Appellee on the instant Brief.)

members of this Court, or counsel might choose if they sat in the General Assembly of Illinois. Nothing could be clearer than the repeated admonitions of this Court that the promulgation of alternative means for enforcing a legitimate end are not within the province of the judiciary.[19]

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19. "The Constitution is satisfied if a legislature responds to the practical living facts with which it deals. Through what precise points in a field of many competing pressures a legislature might most suitably have drawn its lines is not a question for judicial reexamination. It is enough to satisfy the Constitution that in drawing them the principle of reason has not been disregarded," McGowan v. Maryland, 366 U.S. 420, 459, 524 (1961) (*Concurring opinion* of Mr. Justice Frankfurter); "But how are competing interests to be assessed? Since they are not subject to quantitative ascertainment, the issue necessarily resolves itself into asking, who is to make the adjustment? —who is to balance the relevant factors and ascertain which interest is in the circumstances to prevail? Full responsibility for the choice cannot be given to the courts. Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgment is best informed, and therefore most dependable, within narrow limits. ***We are to set aside the judgment of those whose duty it is to legislate only if there is no reasonable basis for it. ***In light of their experience, the Framers of the Constitution chose to keep the judiciary dissociated from direct participation in the legislative process. ***The distinction which the Founders drew between the Court's duty to pass on the power of [the legislature] and its complementary duty not to enter directly the domain of policy is fundamental. ****Our duty to abstain from confounding policy with constitutionality demands perceptive humility as well as self-restraint in not declaring unconstitutional what in a judge's private judgment is deemed unwise and even dangerous,*" Dennis v. United States, 341

It has been suggested, however, and Appellant implicitly argues,[20] that this traditional test of equal protection is not applicable in cases where the claim is made that a "suspect" factor, such as race or wealth, accounts for the legislative classification.[21] In these cases, it is said, the obligation of the Court is to go beyond a finding that the classification is reasonably related to a valid legislative purpose:

> "A more careful articulation than that given by the Court of its role in equal protection review of state action using suspect classifications therefore appears to be that, while the Court must be satisfied, first, that the legislation has a legitimate governmental objective and, secondly, that the classification involved is reasonably related to the attainment of the legislative purpose, it must also be satisfied that the benefit to society from the state action outweighs the harm caused to those unfavorably classified. Some of the pre-*Griffin* suspect classification cases, most notably *Oyama* and *Takahashi*, seem capable of explanation only as a Court determination of the weight of com-

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U.S. 494, 517, 525, 552 (1951) (concurring opinion of Mr. Justice Frankfurter) (emphasis added); "But it is for the legislature, not the courts, to balance the advantages and disadvantages of the . . . requirement. ***It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it. ***We emphasize again what Chief Justice Waite said in Munn v. State of Illinois . . . 'For protection against abuses by legislatures, the people must resort to the polls, not to the courts'", Williamson v. Lee Optical of Oklahoma, 348 U.S. 483, 487-88 (1955).

20. Br. 21.

21. Abascal, *Municipal Services and Equal Protection: Variations on A Theme By Griffin* v. *Illinois*, 20 HAST. L. J. 1367, 1378-82 (1969).

peting interests under this final inquiry. Even in those suspect-classification cases which can perhaps be explained on the basis of the two traditional inquiries, such as *Yick Wo* and *Kotch*, the Court has given important consideration to the question of the harm caused to those unfavorably classified. Such an inquiry would seem irrelevant under the traditional formulation of the Court's role in equal protection review.

If equal justice for rich and poor is properly regarded as one of the objectives of the equal protection clause, the Supreme Court is surely correct in considering the provision applicable where the administration of criminal justice may achieve one result for the rich and another result for the poor. Classification between rich and poor can be reasonably related to the achievement of legitimate governmental objectives. Under the standard of equal protection review which has been suggested, the appropriate inquiry then becomes whether the benefit to society from the state action outweighs the harm caused to the indigent defendant. In cases decided subsequent to *Griffin*, the Court has struggled with this question."[22]

There are a number of reasons, however, why, even assuming the applicability of this expanded test to this case, §1-7(k) does not violate the Equal Protection Clause.

First, "*Griffin* and its progeny" have never been extended beyond those stages of a criminal proceeding where the issue is guilt or innocence or the opportunity for a fair review of the trial and verdict.

It is one thing to hold that the state must pull down the financial barriers "where financial inequality produces con-

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22. Fahringer, *Equal Protection and the Indigent Defendant: Griffin and Its Progeny*, 16 STAN. L. REV. 394, 404, 406 (1964).

sequences of state action which differ for rich and poor although the action of the state itself is neutral"[23] and the issue is whether an indigent defendant will have the same chance to obtain appellate review as the defendant who can purchase a transcript. It is quite another to say that the Equal Protection Clause compels the adoption of a scheme which releases indigents from their obligation to "work off" an unpaid fine after trial, verdict, sentence and review.

It is one thing to hold that the cost of transcripts and appellate fees must be borne by the state. It is quite another to hold that the command of equal protection reaches so far into the post-adjudication process that we must risk the threat of destruction to the whole system of fines and the ability of the trial courts to enforce the laws which carry fines as the exclusive punishment. Even under the most expansive reading of the "balancing test", it could not be doubted that this threat to the enforcement of the criminal laws of the fifty states and the federal government does not outweigh the disadvantages to the indigent under the "work off" system.

Moreover, the threat of a holding which Appellant requests cannot be confined to the societal interests involved in the efficacy of the fine system. If it is a violation of the Equal Protection Clause to compel an indigent defendant to "work off" a fine during incarceration, then it violates equal protection to demand from the indigent the payment of monetary bail to obtain freedom from pre-trial detention.[24]

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23. *Id.* at 405.

24. The federal and state provisions which guarantee that an accused charged with a non-capital crime shall be

In every case—from traffic court to the Supreme Court of the United States—the indigent defendant would be entitled to a hearing on the question of whether there exist factors, other than the risk of pecuniary loss, which make it reasonable to assume that a defendant would be present for trial.

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admitted to bail have been interpreted by this Court as requiring that "excessive bail" may not be required. Stack v. Boyle, 342 U.S. 1 (1951). As Mr. Justice Jackson stated *in his concurring opinion*, "This is not to say that every defendant is entitled to such bail as he can provide, but he is entitled to an opportunity to make it in a reasonable amount." 342 U.S. 10.

Thus, release of a defendant pending trial is conditioned upon the payment of a reasonable amount of money. This is determined by reference to various factors only one of which is the defendant's ability to pay. This Court often has recognized the validity of other factors in restricting the right of the defendant to be free prior to trial by their effect on the amount of bail set. Such factors affect the likelihood of the defendant's appearance at trial should he be released—the gravity of the pending criminal charge and the length of the possible sentence, the defendant's age and prior criminal record, and his conduct on any prior release on bond. Stack v. Boyle, 342 U.S. 8.

Restriction of a defendant's freedom by the imposition of a financial condition for release occurs in the bail process at a stage where the defendant's interests are entitled to greater weight than in the instant case, since he has not yet been convicted of any crime. Actually, the bail situation presents a substantially harsher restriction on a defendant than does imprisonment for non-payment of a fine upon conviction of an offense because the indigent imprisoned for non-payment in Illinois receives a reasonable per diem financial credit which diminishes the amount of time which he must serve and he is protected from serving any

Second, if the test is one of balancing interests it is appropriate to inquire whether the hand of this Court should be stayed while resort is had to the legislature. Or, to put it another way, should reform in the area of monetary punishment and the indigent—if reform is required—be sought through the legislative and political processes?[25] There are two considerations involved.

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longer than six months by the limitation period included within the Illinois statute. The defendant who is incarcerated prior to trial because he is unable to make his bail is protected only by the constitutional guarantee of a speedy trial with no specification of what period of time he will actually have to serve before his trial. Yet the imposition of money bail has been upheld in the face of just such an equal protection argument as appellant attempts here. In Butler v. Crumlish, 229 F. Supp. 565, 567 (E. D. Pa. 1964), the court recognized that the "accused is not a convict, and that it is only strong necessity that compels his detention before trial," but recognized that "the differences that necessarily result from imprisonment while awaiting trial and freedom on bail cannot be made the foundation for any constitutional objection because of discrimination for the distinction is constitutionally recognized."

A holding that §1-7(k) of the Illinois Criminal Code violates the Equal Protection Clause, however, would compel a holding that monetary bail cannot be demanded of the indigent. Fahringer, *Equal Protection and the Indigent Defendant: Griffin and Its Progeny*, 16 STAN. L. REV. 394, 410-12(1964); *Comment, Indigent Court Costs and Bail: Charge Them To Equal Protection*, 27 MD. L. REV. 154, 165-68(1967); *cf., Griffin* v. *Illinois*, 351 U.S. 12, 26, 29 (1956) (*dissenting opinion* of Mr. Justice Burton).

25. "Also relevant [to the balancing test] are the appropriateness of federal intervention into these local concerns, necessarily inherent in application of federal constitutional standards, and the appropriateness of judicial,

First, there is nothing in the record of this case, or in common experience, which suggests that the alternatives to the "work off" system advanced by Appellant are feasible.[26]

Second, experience in comparable areas of the criminal justice system demonstrates that the states are quite sensitive to reform when the need has been convincingly shown. In the field of pre-trial bail, for example, reform has come about, not through the compulsion of this Court in the explication of the Equal Protection Clause,[27] but through the interaction of private and community demonstration proj-

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rather than legislative, solution of these problems," *Fahringer, supra* note 24 at 410.

26. The alternatives suggested by Appellant involve costs of organization and administration which would place an additional financial burden on the State while depriving Illinois of the benefit of labor from these defendants, with no guarantee that the fine would ever be satisfied. The Appellant's suggestion of garnishment as a means of enforcing payment is unrealistic at best since it assumes that the state has the manpower and resources to find work for each non-paying defendant and that the defendant will remain on the job, earning a salary. If the defendant leaves the job, however, not only does the state lose the only *res* available to garnishment proceedings (since the defendant is by definition indigent), it then would be required to expend more money in locating the defendant, taking him into custody and returning him to the jail facility where he would then be subjected by Appellant's theory to exactly the same procedure which Illinois now employs to enforce payment of the fine.

27. *Cf.* Bandy v. United States, 82 S. Ct. 11, 13 (1961) (opinion of Mr. Justice Douglas in Chambers).

ects[28] and legislative cognizance and endorsement of their findings.[29]

This is not to say that this Court is obligated to withhold appropriate relief when it has been clearly shown that the states have no intention of complying with the plain mandate of the Constitution. It is to say, however, that a system of criminal justice which is built only upon the grudging acceptance by the states of decisions of this Court attempting to regulate every phase of the administration of criminal justice in the name of "fairness" and "wisdom" will neither work nor long endure.

The appropriate conclusion was set forth by this Court long ago in a related context:

> The sensitiveness of the . . . mechanism, the risks of introducing new evils in trying to stamp out old, familiar ones, the difficulties of proof within the conventional modes of procedure, the effect of shifting tides of public opinion—these and many other subtle factors must influence legislative choice. Moreover, the whole problem of deterrence is related to still wider considerations affecting the temper of the community in which law operates. The tradition of a society, the habits of obedience to law, the effectiveness of the law-enforcing agencies, are all peculiarly matters of time and place. They are thus matters within legislative competence.[30]

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28. See ABA Minimum Standards Relating to Pretrial Release, pp. 1-7 (Approved Draft 1968).

29. See, e.g. Ch. 38, §§110-5 to 110-7 Ill. Rev. Stat. (1969).

30. Tigner v. Texas, 310 U.S. 141, 149 (1940).

CONCLUSION

The State of Illinois requests that the judgment of the Supreme Court of Illinois be affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1089

WILLIE E. WILLIAMS,

Appellant,

vs.

ILLINOIS,

Appellee.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

BRIEF OF THE CITY OF CHICAGO AS AN AMICUS CURIAE URGING AFFIRMANCE.

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INTEREST OF THE AMICUS CURIAE.

The City of Chicago, Illinois, a municipal corporation, hereby respectfully presents, pursuant to Rule 42(4) of the Rules of this Court, its brief of an *amicus curiae*, supporting the position of the appellee.

Since this brief *amicus curiae* is being filed by a political subdivision of a State sponsored by the authorized law officer thereof, consent to its filing appears to be unnecessary. However, the consent of the attorneys for both the appellant and for the appellee has been obtained. These consents are being filed with this brief.

The interest of the City of Chicago and other municipalities in the subject of this case is very great, probably even greater than that of Illinois and the other state governments.* Determination of whether the device of requiring convicted offenders who refuse or cannot pay their fines to work off those fines in jail is constitutional or not will have prodigious effect on law enforcement in municipalities. The resolution of this issue will impinge directly on the standing problem of disciplining many thousands of ordinance violators each year, a substantial percentage of whom, for one reason or another, do not pay their fines.

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* Sections 51 and 52 of the Illinois Jails and Jailers Act (Ill. Rev. Stat. 1969, ch. 75, §§ 51, 52) provide that persons convicted of violations of ordinances of a municipality or other political subdivision of the state shall, upon nonpayment of a fine imposed therefor, be imprisoned until the fine is satisfied at the rate of $5 per day, with the qualification that no one shall be so imprisoned for a longer period than 6 months for any one offense.

This enactment exactly parallels Section 1-7 (k) of the Illinois Criminal Code (Ill. Rev. Stat. 1969, ch. 38, §§ 1-7(k), here attacked by appellant as unconstitutional.

ARGUMENT.

It is not the intention of the City of Chicago to advocate that different standards of justice should be imposed on the poor. But the fact of life is that unfortunately there are poor persons and that unfortunately poor persons do on occasion commit crimes. There are persons who cannot pay fines. There are also individuals who refuse to do so. Together they present a special problem, a very large problem, which the criminal law must attempt to cope with as best it can. Legislation is not unconstitutional because it recognizes and addresses itself to this difficult problem.

That rich persons can pay fines with ease has no relevance to devising a practical method of dealing with convicted defendants who for one reason or another do not pay fines. Appellant's argument falsifies and sentimentalizes the whole problem by its creation of a sharp dichotomy between rich and poor. Incomes in Illinois, as in the other states, cover a very broad range. The rich constitute only a comparatively small segment of the population, especially of the convicted criminal population. Most persons have to earn their bread by labor more or less onerous. The working class—blue and white collar—make up the majority. Most people cannot pay a substantial fine with ease.

A system which permitted the indigent to get off with their fines unpaid would discriminate against the great working majority who must pay their fines with their own hard-earned money. Even to the rich the imposition of a fine, by virtue of the stigma attached to it, may constitute a greater penalty than incarceration is for the anonymous, homeless destitute.

The sentence imposed on Williams was not meted out to him because he was indigent. It was inflicted upon him because he had committed a criminal offense, a theft. Once convicted, he has no constitutional right to receive for the same type of offense the same punishment that any other defendant, no matter what his economic status, receives. *United States ex rel. Privitera* v. *Kross,* 239 F. Supp. 118, at 120 (S. D. N. Y., 1965); aff'd, 2 Cir., 1965, 345 F. 2d 533; cert. den. 382 U. S. 911 (1965).

Equal protection of the laws guarantees an equal right to a fair trial to rich and poor (and those in between) alike. The right to a fair trial is a species of protection of the law. But punishment, though legal, is not protection. The principles by which fair trial is assured are not the same as those by which the punishment is made to fit the crime and the offender. *Griffin* v. *Illinois,* 351 U. S. 12 (1956), cited by appellant (Brief, pp. 24, 25, 26, 31), which held the due process clause of the Fourteenth Amendment violated by a state's denial of effective appellate review because of an indigent defendant's inability to pay for a transcript, is patently distinguishable. The right to full appellate review of a criminal conviction, though a statutory grant, is virtually an integral part of the right to a fair trial.

The prevailing modern philosophy of penology is that the punishment should fit the offender and not merely the crime. As this Court said in *Williams* v. *New York,* 337 U. S. 241, at 247, 248 (1949):

> "The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender. . . . . This whole country has travelled far from the period in which the death sentence was an automatic and commonplace result of convictions—even for offenses today deemed trivial.

> Today's philosophy of individualizing sentences makes sharp distinctions for example between first and repeated offenders. Indeterminate sentences, the ultimate termination of which are sometimes decided by non-judicial agencies, have to a large extent taken the place of the old rigidly fixed punishments. The practice of probation which relies heavily on non-judicial implementation has been accepted as a wise policy. Execution of the United States parole system rests on the discretion of an administrative parole board."

The incarceration of persons who either refuse or are unable to pay fines is both a practice long established in this country and a practice endorsed by many contemporary experts. It was upheld by this Court as long ago as 1842 in *United States* v. *Murphy*, 41 U. S. (16 Pet.) 203. Its embodiment in Section 1-7(k) of the Illinois Criminal Code (Ill. Rev. Stat. 1969, ch. 38, § 1-7(k)) was drafted as recently as 1961 by the Joint Committee of the Illinois State and Chicago Bar Associations to Revise the Illinois Criminal Code, a committee composed of judges, lawyers and law professors experienced in criminal law. The opinion of the Illinois Supreme Court in the case at bar notes (42 Ill. 2d at 516) that the report of this committee (Committee Comments, Smith-Hurd Illinois Anno. Stat., ch. 38, § 1-7, p. 31) stated:

> "No provision is made for discharge on a pauper's oath since it is considered that on any conviction for a criminal offense the intent present is equivalent to the malice requirement in civil cases, in which discharge prior to the six months limit may be obtained only upon payment of the judgment."

That there may be differences of opinion as to the preferable method of enforcing payment of unpaid fines, taking into consideration the various elements of fairness and realistic practicality, does not make the Illinois statutory design unconstitutional.

It is, we repeat, a difficult problem. As the Task Force Report on the Courts of the President's Commission on Law Enforcement and Administration of the Courts (1967) states (at p. 18):

> "Putting all offenders in jail is a wholly unacceptable alternative, as is relieving those unable to pay a fine of all penalties."

The proposal of the appellant that the state use a system of installment arrangements or execution (Appellant's Brief, p. 21) is largely unrealistic. Execution and levy are worthless in dealing with indigents and non-indigents with meager resources and are in large measure ineffectual in coping with any dishonest debtor. A system of collection in installments might be successful in many instances. Reports of such systems working well in Sweden and Great Britain (Appellant's Brief, p. 20) are encouraging. But, as is well known, law enforcement and observance in those countries are quite different from what they are in this and police and criminal law measures are not readily transferable from there to here. It is a matter requiring investigation, for which a legislative committee is the apt instrument. Whether the installment method should be used is for the legislative discretion. The United States Constitution does not require it.

The New York statute—enacted in response to *People* v. *Saffore*, 18 N. Y. 2d 101, 218 N. E. 2d 686 (1966)—which permits a defendant unable to pay a fine imposed by the court to apply to the court for resentence and provides that, upon resentence, the court, if satisfied that the defendant is unable to pay the fine, is prohibited from imposing any fine in excess of the amount the defendant is able to pay, but may otherwise decree any sentence it originally could have prescribed, is another permissible alternative solution to the problem. Whatever the obvious merits of the

New York system, it seems calculated to result on the whole in more and longer jail sentences. It appears to be a new device and there is nothing in the record indicating that any authoritative study of its operation is yet available. So far the Illinois legislature has not seen fit to adopt it and the United States Constitution does not require that it be adopted.

The appellant in his brief has completely overlooked Sections 35-41 of the Illinois Jails and Jailers Act (Ill. Rev. Stat. 1969, ch. 75, §§ 35-41). This is entitled *Employment of Persons Committed* and was enacted in 1967, effective January 1, 1969. Section 35 thereof provides:

> "*35. Work release order.*] § 1. In the case of any person committed to the county jail, house of correction or workhouse, for any crime or for non-support of any member of his family, or for non-payment of a fine, or for contempt of court, the court may, in its order of commitment provide that such person may leave the county jail, house of correction or workhouse during necessary and reasonable hours for any of the following purposes:
>
> "(a) Seeking employment;
>
> "(b) Working at his employment;
>
> "(c) Conducting his own business or other self-employed occupation including, in the case of a woman, housekeeping and attending the need of her family;
>
> "(d) Attendance at an educational institution, or
>
> "(e) Medical treatment,
>
> "Unless such work release order is expressly granted by the court, the prisoner is expressly sentenced to ordinary confinement. The prisoner may petition the court for such work release at the time of sentence or thereafter, and in the discretion of the court may renew his petition. The court may revoke the work release order at any time with or without notice."

Section 36 of the Act empowers the court to order the sheriff or the superintendent of a house of correction to make every reasonable effort to secure some suitable employment for a prisoner. It further specifies that any prisoner for whom such employment is procured shall not be required to work more than 8 hours per day or 48 hours per week.

Under Section 37 the clerk of the circuit court is charged with the duty of collecting the earnings of prisoners and charging against each prisoner's earnings the cost of his board (not to exceed $3.50 per day), travel expenses to and from work and support of the prisoner's dependents (if any). The balance is to be paid to the prisoner on his discharge.

Individual records are required to be kept of each prisoner's account by the clerk, under Section 40. The moneys are to be deposited in a trust account designated by the county board. The accounts are subject to audit in the same manner as accounts of the county.

Section 41 of the same act provides that the committing court retains jurisdiction during the term of commitment and may order a diminution of the sentence if the conduct of the prisoner merits such diminution.

It is submitted that the Illinois statutory plan providing for the employment of prisoners is the best solution that has been devised for the problem created by indigents unable to pay fines.

There is no indication in the Appellant's Brief that he has made any effort to seek relief under this statute. Although his fine of $500 remains unsatisfied, with the exception of a credit of $25 he has apparently accumulated by imprisonment for five days elapsing between completion of his jail sentence of one year and his release on bail pending appeal (A. 31, 35), Williams has not petitioned

the Circuit Court for an order under the statute which has now been in effect 15 months. Williams has not given the Illinois system a fair chance.

CONCLUSION.

The constitutionality of the Illinois statute requiring criminal offenders who do not, for whatever reason, pay their fines, to work off their fines in jail, should be upheld.

The judgment of the Illinois Supreme Court should be affirmed.

Respectfully submitted,

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March 30, 1970.

IN THE

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ILLINOIS

APPEAL FROM THE SUPREME COURT OF ILLINOIS

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APPELLANT'S BRIEF

OPINION BELOW

The opinion of the Supreme Court of Illinois affirming denial of appellant's motion to vacate that portion of his sentence which directed that he stand committed to the Cook County Jail in default of payment of $505 fine and costs is reported at 41 Ill.2d 511, 244 N.E. 2d 197 (1969) and is set forth in the Appendix at pp. 36-41. There was no opinion in the court of first instance, the Fourth Municipal District of the Circuit Court of Cook County, Illinois.

JURISDICTION

Jurisdiction of this Court is conferred pursuant to 28 U.S.C. § 1257(2), this being an appeal which draws into question the validity of statutes of the State of Illinois as being repugnant to the Constitution of the United States, their validity having been upheld in the courts of the state. This Court noted probable jurisdiction on January 19, 1970.

QUESTION PRESENTED

Whether Illinois statutes which authorize a pauper's imprisonment in excess of the maximum period otherwise set by law, at the rate of five dollars per day for payment of a fine and costs, despite the fact that he is willing and able to pay them if given the opportunity, violate the Equal Protection Clause of the Fourteenth Amendment?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourteenth Amendment to the Constitution of the United States.

This case involves the following statutes of the State of Illinois:

1. Illinois Rev. Stat. 1967, ch. 38, par. 1-7

Judgment, Sentence and Related Provisions

(a) Conviction and Sentence.

A person convicted of an offense shall be sentenced as provided in this Section.

(b) Determination of Penalty.

Upon conviction, the court shall determine and impose the penalty in the manner and subject to the limitations imposed in this Section.

* * *

(d) Authorized Penalties.

Except as otherwise provided by law, a person convicted of an offense may be:

(1) Sentenced to death; or

(2) Sentenced to imprisonment as authorized by Subsections (e) and (f) of this Section; or

(3) Ordered to pay a fine authorized by Subsection (i) of this Section; or

(4) Placed on probation; or

(5) Ordered to pay a fine and placed on probation; or

(6) Sentenced to imprisonment and ordered to pay a fine.

(e) Penitentiary Sentences.

All sentences to the penitentiary shall be for an indeterminate term. The court in imposing a sentence of imprisonment in the penitentiary shall determine the minimum and maximum limits of imprisonment. The minimum limit fixed by the court may be greater but shall not be less than the minimum term provided by law for the offense and the maximum limit fixed by the court may be less but shall not be greater than the maximum term provided by law for the offense.

(f) Sentences other than to Penitentiary.

All sentences of imprisonment other than to the penitentiary shall be for a definite term which shall not exceed one year.

(g) Mitigation and Aggravation.

For the Purpose of determining sentence to be imposed, the court shall, after conviction, consider the evidence, if any, received upon the trial and shall also hear and receive evidence, if any, as to the moral character, life, family, occupation and criminal record of the offender and may consider such evidence in aggravation or mitigation of the offense.

* * *

(j) Penalty Where Not Otherwise Provided.

The Court in imposing sentence upon an offender convicted of an offense for which no penalty is otherwise provided may sentence the offender to a term of imprisonment not to exceed one year or a fine not to exceed $1,000, or both.

(k) Working out Fines.

A judgment of a fine imposed upon an offender may be enforced in the same manner as a judgment entered in a civil action; provided, however, that in such judgment imposing the fine the court may further order that upon nonpayment of such fine, the offender may be imprisoned until the fine is paid, or satisfied at the rate of $5.00 per day of imprisonment; provided, further, however, that no person shall be imprisoned under the first proviso hereof for a longer period than 6 months.

(1) Place of Confinement.

When a statute authorizes imprisonment for its violation but does not prescribe the place of imprisonment, a sentence of more than one year shall be to the penitentiary, and a sentence not to exceed one year shall be to a penal institution other than the penitentiary. . . .

2. Ill. Rev. Stat., 1967, ch. 38, par. 180-6

Discharge of Pauper

Whenever it shall be made satisfactorily to appear to the court, after all legal means have been exhausted, that any person who is confined in jail for any fine or costs of prosecution, for any criminal offense, hath no estate wherewith to pay such fine and costs, or costs only, it shall be the duty of the said court to discharge such person from further imprisonment for such fine and costs, which discharge shall operate as a complete release of such fine and costs: Provided, that nothing herein shall authorize any person to be discharged from imprisonment before the expiration of the time for which he may be sentenced to be imprisoned, as part of his punishment.

3. Ill. Rev. Stat. 1967, ch. 38, par. 16-1:

Theft

A person commits theft when he knowingly:

(a) Obtains or exerts unauthorized control over property of the owner; or

(b) Obtains by deception control over property of the owner; or

(c) Obtains by threat control over property of the owner; or

(d) Obtains control over stolen property knowing the property to have been stolen by another or under such circumstances as would reasonably induce him to believe the property was stolen, and

(1) Intends to deprive the owner permanently of the use or benefit of the property; or

(2) Knowingly uses, conceals or abandons the property in such a manner as to deprive the owner permanently of such use or benefit; or

(3) Uses, conceals, or abandons the property knowing such use, concealment or abandonment probably will deprive the owner permanently of such use or benefit.

Penalty

A person first convicted of theft of property not from the person and not exceeding $150 in value shall be fined not to exceed $500 or imprisoned in a penal institution other than the penitentiary not to exceed one year, or both. A person convicted of such theft a second or subsequent time, or after a prior conviction of any type of theft, shall be imprisoned in the penitentiary from one to 5 years. A person convicted of theft of property from the person or exceeding $150 in value shall be imprisoned in the penitentiary from one to 10 years.

4. Ill. Rev. Stat. 1967, ch. 38, par. 180-4

Judgment lien on property, real and personal—Execution

The property, real and personal, of every person who shall be convicted of any offense, shall be bound, and a lien is hereby created on the property, both real and personal of

every such offender, not exempt from execution or attachment, from the time of finding the indictment at least so far as will be sufficient to pay the fine and costs of prosecution. The clerk of the court in which the conviction is had shall upon the expiration of thirty (30) days after judgment is rendered issue an execution for any fine that remains unpaid, and all costs of conviction remaining unpaid; in which execution shall be stated the day on which the arrest was made, or indictment found, as the case may be. The execution may be directed to the proper officer of any county in this State. The officer to whom such execution is delivered shall levy the same upon all the estate, real and personal, of the defendant (not exempt from execution), possessed by him on the day of the arrest or finding the indictment, as stated in the execution and any such property subsequently acquired; and the property so levied upon shall be advertised and sold in the same manner as in civil cases, with the like rights to all parties that may be interested therein. It shall be no objection to the selling of any property under such execution, that the body of the defendant is in custody for the fine or costs, or both.

STATEMENT

On June 24, 1967, appellant, Willie E. Williams, was arrested for the crime of theft of property not from the person, and not exceeding $150 in value, Ill. Rev. Stat. 1967 ch. 38, par. 16-I, (A.2) and charged with having "knowingly obtained unauthorized control over credit cards, checks and papers of the value of less than one hundred and fifty dollars, the property of Edna Whitney, intending to deprive the said Edna Whitney permanently of the use and benefits of said property." (Ibid).

August 14, 1967, he was brought before the Circuit Court of Cook County at suburban Maywood, Illinois for arraignment; bail was set at $2,000 (A.5,6). Unable to post bail, appellant remained in custody. (A.12). The court

continued the case to August 16, 1967, and committed Williams to the custody of the sheriff. (A.6). August 16, 1967, on motion of the State Attorney, the case was continued to September 6, 1967 (A. 7).

September 6, 1967, appellant entered a plea of not guilty and "waived" his right to trial by jury. (A.8) Williams was at no time represented by counsel during the proceedings in the trial court (A. 8, 13).[1] After trial, the Honorable Joseph R. Gill found appellant guilty as charged (A.9) and sentenced him to the maximum term of imprisonment for a first offense authorized by Illinois law: one year in the Cook County Jail (A.9). Judge Gill further sentenced appellant:

> . . . to pay the Clerk of this Court, to be by said Clerk disposed of according to law, a fine in the sum of FIVE HUNDRED DOLLARS ($500) and also the costs of this suit taxed at FIVE DOLLARS ($5.00) and in default of payment of said fine, it is ordered that said defendant, after the expiration of said term of imprisonment, stand committed in said County Jail until said fine and costs shall have been paid or until said defendant shall have been discharged according to law. (Ibid.)[2]

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[1] Williams was tried in a suburban court where there is no regularly assigned public defender or official court reporter. Without a transcript, it is impossible to determine authoritatively whether the magistrate in this case advised Williams of his right to appointed counsel. Counsel for appellant are informed, however, that the practice in the Maywood court is that if a defendant requests an appointed counsel, the case is transferred to the central court of the District where there is a Public Defender regularly assigned one day per week, but that a criminal defendant is not otherwise apprised of his right to counsel.

[2] Judge Gill thus imposed the maximum term of imprisonment and fine permitted upon a first conviction of the crime of theft of property not from the person and not exceeding $150 in value, Ill. Rev. Stat. 1967 ch. 38, par. 16-I.

November 29, 1967, with the assistance of attorneys associated with the Civil Legal Aid Service in the Cook County Jail,[3] appellant filed a petition under Section 72 of the Illinois Civil Practice Act and under Ill. Rev. Stat. 1967, ch. 38, par. 180-6, to vacate that portion of the trial court's order of September 6, 1967, which directed that Williams remain imprisoned upon expiration of his one year jail sentence for petty theft, in default of payment of the $500 fine and $5 in costs (A. 1,2).

In the petition, Williams affirmed under oath that he was then an indigent inmate of the Cook County Jail and had no estate, funds, or valuable property whatsoever (A. 1-2);

that he was financially unable to obtain counsel at the time of his trial and was never advised by the trial court of his right to have counsel assigned;

that when he was sentenced on September 6, he was unable to pay the $505 fine and costs (as should have been apparent to the trial court as he had not been able to furnish the 10% deposit on his $2,000 bond which would have authorized his release under Illinois law) or to retain an attorney;

that he had been incarcerated since August 13, 1967, and therefore incapable of earning a livelihood;

that he remained on the date of the petition without funds to pay the $505 fine and costs;

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[3]The Civil Legal Aid Service in the Cook County Jail was established in 1966 by the Center for Studies in Criminal Justice, University of Chicago Law School, with a grant from the Ford Foundation. In recognition that the need of prisoners for legal assistance on civil matters extends far beyond the conventional types of civil cases, the Civil Legal Aid Service has filed petitions for habeas corpus and sought other forms of post-conviction relief on behalf of prisoners, as well as engaged in the more traditional types of civil representation. There were no criminal defense services available to litigate appellant's challenge to his imprisonment for inability to pay a fine. Thus, the Civil Legal Aid Service undertook representation of the appellant as being properly within the mandate of its program.

and finally that "defendant will be able to get a job and earn funds to pay the fine and costs if he is released from jail upon expiration of his one year sentence" (A.13).

At the November 29, 1967, hearing on the petition, held before Judge Gill, the judge who had sentenced appellant, no court reporter was present.[4] At no time subsequent to the filing of the petition, however, did the state traverse its factual allegations or offer evidence challenging the allegations of the petition. (A.25, 26). Appellant's counsel summarized the allegations of the petition and the State's Attorney moved that it be denied. (Ibid). Judge Gill denied the petition on its face;

> "...for the reason that petitioner was not legally entitled at that time to the relief requested in the petition, *because he still has time to serve on his jail sentence and when that sentence has been served financial ability to pay a fine might not be the same as it is of the date of September 6, 1967.*" (Italicized portion written into the bill of exceptions by Judge Gill.) (A.26)

Notice of appeal to the Supreme Court of Illinois from Judge Gill's order denying appellant's petition was filed on November 30, 1967 (A. 16), and the appeal was argued orally on May 16, 1968 (A.31) May 23, 1968, appellant completed service of his one year sentence, less time off for good conduct and for time spent in custody prior to trial, and began to serve the period of incarceration required to satisfy the $505 fine and costs, at the statutory rate of $5 per day. (A.31). On May 28, 1968, the Supreme Court of Illinois, on motion of appellant's counsel, set bail for appellant pending his appeal at $500. (A.35). The 10% deposit ($50), $45 of which is refundable, was posted by the Civil Legal Aid Service.

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[4]In accord with an order dated January 30, 1968, of a Justice of the Supreme Court of Illinois, appellant constructed a bystander's bill of exceptions covering the proceedings of November 29, 1967, without waiving his objections to the validity and propriety of non-reported proceedings: (A.22-26).

Appellant argued before the Supreme Court of Illinois that his imprisonment for default in payment of a fine and costs, pursuant to Ill. Rev. Stat. 1967, ch. 38, § 1-7(k), and his exclusion from coverage of Ill. Rev. Stat. 1967, ch. 38, § 180-6 (which provides for discharge from imprisonment under specified circumstances) rendered both statutes unconstitutional under the Fourteenth Amendment.

On January 29, 1969, the Illinois Supreme Court affirmed the judgment of the lower court denying appellant's petition,[5] and held that there is no denial of equal protection of the laws when an indigent defendant is imprisoned to satisfy payment of a fine and costs (A.37, 40).

Appellant filed timely notice of appeal to this Court on February 11, 1969 (A.48). By an order of February 13, 1969, the Supreme Court of Illinois stayed its mandate pending final disposition of the appeal (A.47). On January 19, 1970, the Court noted probable jurisdiction (A.49).

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[5]The Supreme Court of Illinois characterized the denial of relief by the trial court as "because of its legal insufficiency." (A.36). By this holding, and by releasing appellant on bail subsequent to the completion of one year in prison, the court appears to have rejected any suggestion of an alternate holding by the trial court that the petition was premature (A.26). The Supreme Court, of course, went on to decide appellant's constitutional claim on the merits.

ARGUMENT

Illinois Statutes Which Authorize a Pauper's Imprisonment in Excess of the Maximum Period Otherwise Set by Law, at the Rate of Five Dollars Per Day, Despite the Fact That He Is Willing and Able To Pay a Fine and Costs if Given the Opportunity, Violate the Equal Protection Clause of the Fourteenth Amendment.

After conviction for a petty theft, appellant Willie Williams was sentenced to confinement in the Cook County jail for the term of one year and to pay a fine of $500 and costs taxed at $5 (A.9). Should Williams default in payment, the trial court ordered that he "stand committed in said County Jail until said fine and costs shall have been paid or until said defendant shall have been discharged according to law" (A.9).[6] Pursuant to § 1-7(k) of the Criminal Code of 1961 (Ill. Rev. Stat. 1967, ch. 38),[7] if

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[6]The judgment further command that the Sheriff "take the body of said defendant and the keeper of said jail is hereby commanded to receive the body of said defendant into his custody and confine said body in said County Jail in safe and secure custody for and during said term as aforesaid, and after the end of said term of imprisonment, the keeper of said jail is hereby commanded to continue to confine the body of said defendant in said County Jail in safe and secure custody until said fine shall have been paid or until said defendant shall have been discharged according to law, and after the expiration of said fixed term of imprisonment as aforesaid, said defendant shall be thereafter discharged."

"It is further ordered that execution issue herein against said defendant for the amount of said fine" (A.9, 10).

[7]This section provides, "Working out Fines. A judgment of a fine imposed upon an offender may be enforced in the same manner as a judgment entered in a civil action; Provided, however, that in such judgment imposing the fine the court may further order that upon non-payment of such fine, the offender may be imprisoned until the fine is paid, or satisfied at the rate of $5.00 per day of imprisonment; Provided, further, however, that no person shall be imprisoned under the first proviso hereof for a longer period than 6 months."

appellant did not pay the fine of $500 and costs of $5, they would be "satisfied at the rate of $5 per day of imprisonment" provided however, that no person "shall be imprisoned. . .for a longer period than 6 months."

Williams alleged "under oath that he was indigent at all stages of the proceedings, that he was without counsel or funds to hire counsel at the trial and that he will be able to get a job and earn funds to pay the fine and costs if he is released from jail upon expiration of his one-year sentence" (A.36). But both the trial court and Supreme Court of Illinois refused to alter his commitment to jail in default of the payment of the fine and costs.

It is plain from the opinion of the Supreme Court in appellant's case, and prior Illinois decisions, that the Supreme Court of Illinois regards the incarceration of a defendant who cannot pay a fine or costs as a punitive exaction by the state which is considered the equivalent of the fine or costs[8] and thus not an invidious classification which violates the Equal Protection Clause.

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[8]In *Berkenfield v. People*, 191 Ill. 272 (1901) a defendant was convicted for obtaining credit by means of false and fraudulent statements and sentenced to one year imprisonment, fined $1,000 (and costs) under the predecessor to Section I-7(k) and required to work out his fine at the rate of $1.50 per day. The court held that a jail term was imposed "not as punishment for the commission of a crime, but to enforce the payment of the fine and costs" (191 Ill. at 278) and that otherwise the sentence or imprisonment and fine would be satisfied by imprisonment only.

In *People v. Jaraslowski*, 254 Ill. 299 (1912) the defendant was found guilty of obtaining money by false pretenses and sentenced to one year imprisonment and fined $500. The judgment order directed that upon non-payment of the fine defendant would be required to work it out at $1.50 per day. The court held:

> "Even though there might be circumstances under which a person would be entitled to be released, under paragraph 455 of the Criminal Code, from working out his fine in the house of correction, yet the mere fact that he is a pauper and has no money to pay the fine does not entitle him to such release."

Analysis reveals, however, that the premise of the Illinois court's reasoning in appellant's case—that giving a wealthy man the choice of paying the $505 or serving 101 days is the equivalent of requiring the poor man to serve 101 days—is palpably false. To be sure, a fine may be a burdensome penalty in specific cases. Depending on the rate at which it may be "worked off", there may even be times when it is a more onerous penalty than imprisonment. It would be to blink at reality, however, to ignore that the state has imposed a far heavier burden on the poor in general, and appellant Williams in particular, by attempting to equate a choice of serving 101 days in jail or paying a $505 fine with the necessity of serving the prison sentence. The fact is that the man without $505—although alleging that he can

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In *People v. Herman*, 245 Ill. App. 94 (1927) the defendant was convicted of assault with a deadly weapon, sentenced to one year imprisonment and fined $1,000 plus costs:

> "Where a proper order is entered under §391, requiring payment of a fine in labor at $1.50 per day, the defendant cannot secure a discharge under §766 by showing he has 'no estate wherewith to pay such fine and costs or cost only.' He must nevertheless pay in labor, as provided in the order, at least unless he can show he is unable to perform labor."

In *People v. Zito*, 237 Ill. 434 (1909) a judgment was obtained against defendant for selling cocaine and he was committed to the county jail until his fine and cost were paid at the rate of $1.50 per day. It was held:

> The constitutional prohibition against imprisonment for debt does not extend to actions of debt for fines and penalties inflicted for violations of the penal laws of the State and it is not error for the judgment in such action to order defendant committed to jail until the penalty is paid.

In *People v. Hedenberg*, 21 Ill. App. 2d 504, 510 (1959) the defendant was convicted of attempting to set fire to a motor vehicle and fined $1,000 to be worked out at the rate of $5.00 per day but was released because physically unable to work, the Court stating:

> "here defendant is being retained in jail at a rate of $5.00 for each day spent in confinement so instead of the state realizing a return from a prisoner's labor; to be applied on his fine, it was incurring the expense of housing and feeding him. That result was not intended by the lawmakers."

and will earn such if allowed his liberty—is subjected mandatorily to severance of family relations, loss of pay, loss of employment, loss of educational opportunity, and the normally dismal, if not inhumane, conditions in short term detention facilities—poor food, and housing, overcrowding, inadequate recreational and other facilities, essential rudimentary comfort and decency.[9] Cf. *Re Gault*, 387 U.S. 1, 27 (1967). In short, he is deprived of the things that make life worth living while the man with $505 is burdened with a necessary inconvenience. As this Court said in *Frank v. United States*, 395 U.S. 147, 151 (1969) "Probation is, of course, a significant infringement of personal freedom, but it is certainly less onerous a restraint than jail itself."[10] Cf. *Duncan v. Louisiana*, 391 U.S. 145, 161-62 (1968).

That both fine and imprisonment are labelled criminal punishments by a state has not misled observers of the criminal process to regard them as fungible. Thus, it is

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[9]Short term detention facilities in Illinois are in a deplorable condition, and fully support the conclusion of "a leading penologist" that such facilities are " 'the lowest form of social institution on the American scene.' " Foote, The Coming Constitutional Crisis in Bail, 113 U. of Pa.-Rev. 1125, 1144-45 (1965). On January 20, 1969 the Chicago *Daily News* reported critical findings of a survey of city and county jails financed by the Ford Foundation and the Illinois Law Enforcement Commission and conducted by the University of Chicago's Center for studies in Criminal Justice under the direction of of criminologist Hans W. Mattick and attorney Ronald P. Sweet. As reported by the *News*, the survey found that " 'the overwhelming majority of all Illinois jail inmates are almost completely idle.' " Three weeks later inspectors from the United States Bureau of Prisons found "gang rule, racial segregation and unsanitary conditions" in the Chicago House of Correction. Chicago *Daily News*, Jan. 21, 1970; Chicago *Sun Times*, Jan. 22, 1970.

[10]Frank was required by the terms of his probation to make monthly reports to his probation officer, associate only with law abiding persons, maintain reasonable hours, work regularly, report all job changes to his probation officer, and not leave the probation district without permission, 395 U.S. at 151 n.6.

generally considered that imposition of the fine by a trial court is "tantamount to a declaration that neither the safety of the community nor the welfare of the (petitioner) require(d) (his) imprisonment . . ." (Sutherland and Cressey, *Principles of Criminology*, p. 277 (5th Ed. 1955).[11] Similarly, the American Bar Association's Committee on Sentencing Standards regards imposition of a fine "an initial determination that jail—or at least the time which is due to non-payment—is unnecessary in terms of the protection of the public, the gravity of the offense, and other factors which normally determine the need for incarceration." (Tentative Draft, 1967, p. 121.) See also Rubin, Weihofen and Rosenzweig, THE LAW OF CRIMINAL CORRECTION, 254 (1963). Indeed, one of our most thoughtful observers of sentencing has argued that the criminal process should be invoked only by means of "the crude benchmark of deprivation of liberty that inheres in an actual or potential sentence of imprisonment" Packer, *The Limits of the Criminal Sanction* 273.[12]

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[11]This conclusion is also supported by the American Law Institute's Model Penal Code Provisions on Sentencing, § 7.02 (Proposed Official Draft, 1962), which provides that a fine should be imposed when the court is "of the opinion that the fine alone suffices for protection of the public."

[12]Professor Packer's view is premised in part on the notion that "The more indiscriminate we are in treating conduct as criminal, the less stigma resides in the mere fact that a man has been convicted of something called a crime" and he concludes that:

> "If the most that we are prepared to exact in the great majority of occurrences of a particular form of reprehended conduct is the payment of money into the public treasury, we should not impose on ourselves the manifold burdens of invoking the criminal sanction. Whether the subject happens to be traffic offenses, or hunting out of season, or breaches of housing codes, or any one of the thousands of minor regulatory or sumptuary offenses with which the criminal sanction and its processes are presently encumbered, we ought to purge from the criminal calendar all offenses that we do not take seriously enough to punish by real criminal sanctions."

It is beyond doubt that those concerned with administration of criminal justice regard a fine as a sanction of a different order of criminal penalty, responding often to a different objective of the criminal law, than imprisonment. If this were not true the jails would be empty, for imprisonment is far more costly to society, not to mention burdensome to the average criminal defendant, than a fine. See *People v. Hedenberg*, 21 Ill. App.2d 504 (1959). Thus to lump both fine and imprisonment together under the label of "punishment" does not imply that each results in the same deprivation. As a Report of the President's Commission on Law Enforcement and Administration of Justice observed in 1967: "Two unfortunate characteristics of sentencing practices in many lower courts are the routine imposition of fines on the great majority of misdemeanants and petty offenders and the routine imprisonment of defenders who default in paying fines. *These practices result in unequal punishment of offenders* and in the needless imprisonment of many persons because of their financial condition." *Task Force Report: The Courts 18.* (emphasis supplied). The Report recommends that society employ suitable alternative punishments so that those unable to pay will not be punished more severely than those of greater means.

Thus Illinois has sanctioned a penological regime which sets an absolute limit on imprisonment for any person with funds in his possession, regardless of the circumstances of his case, but permits a greater punishment—because 101 days in jail is far more onerous a punishment than the choice of paying the fine of $505 or serving the sentence—over the defined maximum state interest in incarceration, in the case of the poor. What slim justification Illinois offers for singling out the poor for extended incarceration amounts to a contention that because [indigency] precludes the state from collecting the fine forthwith it must be entitled to imprisonment forthwith. Even assuming arguendo that some "necessity" of providing punishment for those who

cannot pay a fine would excuse imposition of a greater penalty, the Illinois practice does not satisfy the Fourteenth Amendment because the state has available to it collection devices far less subversive of equal protection than imprisonment. In this case appellant affirmatively alleged, and the state did not dispute, that if permitted his liberty he could and would obtain work and pay the fine. Although appellant could have avoided the extended sentence if he raised the $505 before his one year prison sentence expired, the possibility, as William's alleged in this case, is an illusion. A man who does not have $505 is incapable of earning it while incarcerated.

Thus, even the state's interest in collecting the fine is not advanced by extended incarceration. In the case of a defendant willing and able to pay the fine if given the opportunity, as to whom no suggestion of contumacious conduct is raised, cf. *Ariel v. Massachusetts*, ___ Mass. ___, 248 N.E.2d 496 (1969) appeal dismissed, 24 L.Ed.2d 468 (1970),[13] the state is simply choosing to extend incarcera-

[13] In *Ariel* the appellant was found guilty of seven motor vehicle violations. A municipal court judge fined the appellant on each complaint in amounts ranging from $10 to $300, for a total of $510. Upon finding the appellant too poor to pay the fine forthwith, the judge sentenced the appellant to jail. The sole reason recited on the order of commitment for refusing to suspend the execution of the sentence was that "the Court finds the defendant unable to pay." On appeal, the Supreme Judicial Court of Massachusetts ordered that the municipal court judge submit "a complete recital of any findings of the court in addition to inability to pay" on which the court based its refusal to suspend execution of the sentence. The municipal court's additional findings, contained a discussion of appellant's prior defaults in appearances on certain motor vehicle violations and a finding that this "contumacious conduct" did not entitle appellant to time for payment. Although the Supreme Judicial Court noted that Massachusetts Law contemplates that a judge before committing to jail a defendant unable to pay a fine immediately, at least consider the desirability of extracting the fine over a period of time rather than automatically increasing the severity of punishment, it elected, nevertheless, to rest its decision affirming the judgment of the Municipal Court on these additional findings of probability of default.

tion without allowing a poor defendant the opportunity to satisfy the state's exaction. As Mr. Justice Jackson said in *Maggio v. Zeitz*, 333 U.S. 56, 64 (1948) ". . . no such acts, however reprehensible, warrant issuance of an order which creates a duty impossible of performance, so that punishment can follow." Illinois is free to set the penalty for petty theft at one year and 101 days but once the maximum imprisonment which satisfies the interests of the state is defined at one year, making extended imprisonment applicable to those who could satisfy the fine if given the opportunity, but who do not have the requisite savings, the state has invidiously distinguished between defendants. As in *North Carolina v. Pearce*, 395 U.S. 711, 718 (1969), Williams will have been subjected to "multiple punishments for the same offense", but in his case solely because of his poverty.

A further example of the manner in which Illinois has singled out indigents for excessive punishment is the state's construction of the Illinois statute which provides for discharge of certain classes incarcerated for nonpayment of fines and costs. Section 180-6 Ill. Rev. Stat. 1967 ch. 38 declares:

> Whenever it shall be made satisfactorily to appear to the Court after all legal means have been exhausted, that any person who is confined in jail for any fine or costs of prosecution, for any criminal offense, hath no estate wherewith to pay such fine and costs, or costs only, it shall be the duty of the said court to discharge such person from further imprisonment for such fine and costs, which discharge shall operate as a complete release of such fine and costs: Provided, that nothing herein shall authorize any person to be discharged from imprisonment before the expiration of the time for which he may be sentenced to be imprisoned, as part of his punishment."

The Illinois Supreme Court limited discharge under this statute to only that class of persons who are physically unable to work at the place of incarceration or when no

work was provided for them at such institutions (A.40). Certainly, if Illinois is prepared to discharge such persons it can hardly claim that incarceration of indigents is necessary to its administration of the criminal law.

As Illinois Law stands appellant is punished simply because he is an able-bodied poor person without savings. The fact that a defendant may be able to work but is without savings or employment,[14] can no longer valid be made the basis for sentencing him to the workhouse. This "theory of the Elizabethan poor laws no longer fits the facts" (*Edwards v. California*, 314 U.S. 160 (1941)) of modern life. Cf. *Robinson v. California*, 370 U.S. 660 (1962). We are a society that has come to recognize that a man's poverty and unemployment often are something over which he has no control. Persons caught in the backwater of a rapidly advancing tide of economic growth should not be penalized because of that fact. Appellant's failure to have $505 in his possession in the instant case is most accurately viewed as an involuntary symptom of his involuntary poverty.[15]

This does not mean that a non-indigent can be fined and an indigent cannot, thus perhaps raising some questions of discrimination against non-indigents. It is clear that alter-

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[14]The irrationality of the $5-A-Day statute is further highlighted when that amount is compared to what a person could earn outside jail on a modern wage scale. Compare 29 U.S.C. §206 (minimum wage $1.60 per hour). In addition, a person in jail working off a fine remains in jail not just for the work day, but around the clock, and during such period is subject to all the strictures and deprivations of liberty which make up the regimen of others in the prison population.

[15]This view has been taken by many courts of late in declaring invalid many of our archaic vagrancy statutes. See, e.g., *Fenster v. Leary*, 30 N.Y. 2d 309, (1967); *Alegata v. Commonwealth*, 353 Mass. 287, 231 N.E. 2d 201 (1967); *Baker v. Binder*, 274 F. Supp. 658 (W.D. Ky. 1967); *Smith v. Hill*, 285 F. Supp. 556 (E.D. N.Y. 1968); *Ricks v. District of Columbia*, 414 F.2d 1097 (D.C. Cir. 1968).

native means for the state to achieve its ends exist, and where this is true the Constitution will not countenance such invidious discrimination against the poor. Illinois law creates a lien in favor of the state which permits execution against an offender's real and personal property, a fine enforcement system similar to the civil remedy of docketing a judgment with a view towards executing on a debtor's acquired property § 180-4, Ill. Rev. Stat. 1967, ch. 38.

Some states have written provisions for installment payments into state law,[16] though trial courts often have inherent power to order installment payments without specific statutory authorization of installment payments.[17] The experience of states and foreign countries with such a system has been successful. In West Virignia, even during the depression, only 5% of persons allowed to pay by installments needed to be committed. Commitments fell by 98% in Sweden and by 96% in Great Britain when installment payment systems were introduced. Note, *Fines and Fining—An Evaluation,* 101 U. Pa. L. Rev. 1013, 1023 (1953). Finally, a trial judge might impose on an indigent a parole requirement that he do specified work during the day to satisfy the fine. Cf. 50 App. U.S.C. § 456.

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[16] CAL. PEN. CODE Section 1205; MD. ANN. Code Art. 52 Sec. 18; MASS. ANN. LAWS ch. 279, Section 1A (1956); MICH. STATS. ANN. Sec. 28.1075 (1959); PA. STAT. ANN. title 19, Section 953-56 (1964); S.C. CODE ANN. Section 55-593 (1962); UTAH CODE ANN. Section 77-53-17 (1953); WASH. REV. CODE ANN. Sec. 9.92.070 (1961); WIS. STAT. Section 57-04 (Supp. 1965).

[17] See *Martin v. Erwin* (USDC WD-La., January 25, 1968; Supplemental Order, February 27, 1968, Civil No. 13084), 12 WELFARE LAW BULLETIN 14, April 1968, CCH Property Law Reporter para. 750, p. 1752 where the district court on an application for a writ of habeas corpus reportedly held that the state court should have permitted the convicted indigent to pay his fine in installments and that providing the defendant with no alternative but to serve a sentence was a denial of equal protection of the laws. The court reportedly granted the writ of habeas corpus and ordered payment of the fines at the rate of $25 per month.

It might be argued that a system of execution or installment collection would be more burdensome on the state than an assumed (dubious though it may be) ability of the state to enjoy the labor of a defendant while in prison. But the imposition of an extended prison term on indigent defendants cannot be justified on the ground of administrative convenience. As the Court said in *Rinaldi v. Yeager*, 384 U.S. 305, 310 (1966):

> Any supposed administrative inconvenience would be minimal since repayment could easily be made a condition of probation or parole, and those punished only by fines could be reached through the ordinary processes of garnishment in the event of default.

Thus, § 1-7(k) is not saved by Illinois attempting to justify it as a means of "working off" the fine during incarceration Defendants with funds are given the choice of merely paying the fine or serving a jail sentence, while indigents *must* remain incarcerated. Secondly, the state has available alternatives less infringing of liberty to collect the fine by means of installment arrangements or execution. Third, the $5 a day rate of conversion of fine into labor is totally unrealistic in light of prevailing wage rates and thus creates a penalty far more severe for the poor. Finally, to the extent a defendant is unable to find work himself, the state through public employment services or public works programs is certainly bound to attempt to find it for him before remitting him to incarceration.

Nor does the use of § 1-7(k) in the cases of recalcitrant defendants who refuse to pay fines raise constitutional difficulties. When a court has determined that a defendant's failure to pay is due to his contumacy, there is no reason why statutes of this type, or indeed the contempt power, may not be used—consistent with the Fourteenth Amendment—to compel the stubborn defendant to pay his fine.[18]

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[18] A manner in which this determination might be made is set forth in the provisions of the Model Penal Code, Proposed Official Draft, § 302.2 (1962):

Continued

But the Supreme Court of Illinois has not adopted such a limited construction of § 1-7(k). There is, moreover, absolutely no indication of contumacy on the part of this appellant. The trial court found none, and appellant's affirmation of his indigency and willingness to pay the $505, if given the opportunity, was accepted by the Illinois courts.

The state's attempt to justify incarceration to "work off" Williams' court cost of $5 is also unnecessarily discriminatory. Costs are taxed against litigants in both civil and criminal cases as a means of financing the operation of the court system, and thus cannot be satisfactorily explained as serving one of the legitimate aims of the criminal law.[19]

"Consequences of NonPayment; Imprisonment for Contumacious Nonpayment;***

"(1) When a defendant sentenced to pay a fine defaults in the payment thereof or of any installment, the Court, upon the motion of [insert appropriate agency of the State or local subdivision] or upon its own motion, may require him to show cause why his default should not be treated as contumacious and may issue a summons or a warrant of arrest for his appearance. Unless the defendant shows that his default was not attributable to a willful refusal to obey the order of the Court, or to a failure on his part to make a good faith effort to obtain the funds required for the payment, the Court shall find his default was contumacious and may order him committed until the fine or a specified part thereof is paid."

[19] Under the rule of *Lawyers Title of Phoenix v. Gerber*, 44 Ill. 2d 145, 254 N.E.2d 461 (1969) if Illinois sought to enforce its judgment against appellant in the same manner as in a civil action, it could not obtain body execution due to mere inability to pay. Even where malice exists, Illinois law requires a showing of refusal to pay.

Article II, §2 of the Illinois Constitution provides that "No person shall be imprisoned for debt, unless upon refusal to deliver up his estate for the benefit of his creditors, in such manner as should be prescribed by law, or in cases where there is strong presumption of fraud." This section relates, however, only to judgments arising out of contracts, expressed or implied, *Cox v. Rice*, 375 Ill. 357 31 N.E. 2d 786 (1947); *Petition of Blacklidge*, 359 Ill. 482, 195 N.E. 3: (1935) *Buck v. Alex*, 350 Ill. 167 182 N.E. 794 (1932) and not to

As Illinois does not imprison the indigent taxed with costs in a civil action, it is difficult to conceive of some justification for doing so in a criminal case. Indeed, the requirement that time in prison be served in default of the payment of costs seems controlled by *Rinaldi v. Yeager*, 384 U.S. 305 (1966) which held a New Jersey statute requiring an unsuccessful defendant repay the cost of a transcript used on appeal violated the Equal Protection Clause. Compare *Strattman v. Studt*, 20 Ohio St. 2d, ___N.E. 2d ___ (1969); see also *Anderson v. Ellington*, 300 F.Supp. 789, (M.D. Tenn. 1969); *Wright v. Matthews*, 209 Va. 246, 163 S.E.2d 158, (1968). (Imprisonment for non-payment of costs violates Thirteenth Amendment).

Once it is conceded, as appellant believes it must, that 101 days required imprisonment is a significantly harsher penalty than the choice of paying fine or serving the prison term which is the punishment for a man with sufficient financial resources to pay immediately, the state's authorization of such a course of punishment in the circumstances of this case conflicts with the Fourteenth Amendment. A primary purpose of the Equal Protection Clause is to secure "the full and equal benefit of all laws and proceedings for the security of persons and property" and to subject all persons "to like punishment, pains, penalties, taxes, licenses and exactions of every kind and to no other." *McLaughlin v.*

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actions for the recovery of penalties inflicted for violations of the penal laws of the state. *People v. Zito*, 237 Ill. 434 86 N.E. 1041 (1909); *Kettles v. People*, 221 Ill. 221, 77 N.E. 472; (1906); *Kennedy v. People*, 122 Ill. 649, 13 N.E. 213 (1887). Nor does the constitutional provision apply to tort actions, *People v. Walker*, 286 Ill. 541, 122 N.E. 92 (1919) or to penalties for violation of municipal ordinances or costs in criminal proceedings, *City of Chicago v. Morrell*, 247 Ill. 383, 93 N.E. 295 (1911).

Florida, 379 U.S. 184, 192 (1964).[20] On the basis of the Equal Protection Clause this Court has acted to eliminate discrimination against the poor from state criminal procedure.[21] In *Griffin v. Illinois*, 351 U.S. 12 (1956) and *Douglas v. California*, 372 U.S. 353 (1963), it was held that

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[20] Earlier decisions are not to the contrary. In *Ex Parte Jackson*, 96 U.S. 727 (1877), the Court was faced with a non-constitutional claim that a federal court exceeded its jurisdiction in committing a defendant until a fine of $100 was paid. No claim of indigency was made and the court ruled only that "the commitment of the petitioner to the county jail, until his fine is paid, was within the discretion of the court under the statute."

In *Hill v. Wampler*, 298 U.S. 460 (1936) the Court merely held, inter alia, that a provision in a commitment for imprisonment for nonpayment of fine and costs which was inserted by a clerk was void. The court stated in dictum that "Imprisonment does not follow automatically upon a showing of default in payment. It follows, if at all, because the consequence has been prescribed in the imposition of sentence. The choice of pains and penalties, when choice is committed to the discretion of the court, is part of the judicial function." (id at 463, 64.) No constitutional claim, no claim of indigency or that the commitment exceeding the maximum set by law seems to have been raised.

[21] A long course of decisions under the Equal Protection Clause have struck down numerous state practices which differentiate between rich and poor in the administration of the criminal process. *Griffin v. Illinois*, 351 U.S. 12 (1956) (denial of free criminal trial transcript necessary for adequate appellate review); *Eskridge v. Washington State Board*, 357 U.S. 214 (1958) (denial, absent trial court finding that "justice will thereby be promoted," of free criminal trial transcript necessary for adequate appellate review); *Draper v. Washington*, 372 U.S. 487 (1963) (denial on trial court finding that appeal is frivilous, of free criminal trial transcript necessary for adequate appellate review); *Lane v. Brown*, 372 U.S. 477 (1963) (denial, absent public defender's willingness to prosecute appeal from denial of state *coram nobis* petition, of free transcript of coram nobis proceeding necessary to perfect state appellate jurisdiction); *Douglas v. California*, 372 U.S. 353 (1962) (denial, absent appellate finding that appointment of counsel on appeal would be of value to defendant or the appellate court, of free appointment of counsel on appeal as of right from criminal conviction); *Burns v. Ohio*, 360 U.S. 252 (1959) (denial

appellate review could not be granted in such a way as to discriminate against defendants on account of their poverty. In both cases, this Court emphasized that "there can be no equal justice where the kind of *trial* a man gets depends upon the amount of money he has." *Griffin v. Illinois*, supra at 19; echoed in *Douglas v. California*, supra at 355 (emphasis supplied). The corollary of this proposition is the one for which appellant argues: there can be no equal justice where the kind of *punishment* a man gets depends upon the amount of money he has. In fact, in appellant's situation the relationship between poverty and prejudice is far more direct. In *Griffin* and *Douglas*, one may only speculate that the defendant would have won his freedom if he had had the money to pay for a transcript; in the present case there is no need for speculation. If the appellant had had the money to pay the fine imposed, he would not have been imprisoned more than one year.

"Lines drawn on the basis of wealth or property, like those of race...are traditionally disfavored." *Harper v. Virginia Board of Elections*, 383 U.S. 663, 668 (1965). Thus lines which discriminate on the basis of wealth are subject to the "very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race." *Loving v. Virginia*, 388 U.S. 1, 9 (1967). Only last term in *McDonald v. Board of Election Commissioners*, 394 U.S. 802, 807 (1969) the Court made it plain the Equal Protection Clause requires

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in default of $20.00 filing fee, of motion for leave to appeal a felony conviction); *Smith v. Bennett*, 365 U.S. 708 (1961) (denial, in default of $4.00 filing fee, of leave to file habeas corpus petition); *Rinaldi v. Yeager*, 384 U.S. 305 (1966) (indigent sentenced to prison may not be forced to pay for appeal transcript out of prison earnings). See also *Williams v. City of Oklahoma City*, 395 U.S. 458 (1969); *Gardner v. California*, 393 U.S. 367 (1969); *Swenson v. Bosler*, 386 U.S. 258 (1967); *Anders v. California*, 386 U.S. 738 (1967); *Roberts v. Lavallee*, 389 U.S. 40 (1967); *Long v. District Court of Iowa*, 385 U.S. 192 (1966).

"A careful examination on our part. . . where lines are drawn on the basis of *wealth* or race. . . ." (Emphasis supplied). A law which discriminates on the basis of race, "even though enacted pursuant to a valid state interest. . . will be upheld only if it is necessary, and not merely rationally related, to the accomplishment of a permissible state policy." *McLaughlin v. Florida*, supra at 196; echoed in *Loving v. Virginia*, supra at 11.

Clearly punishment of thieves is a permissible state interest. However, the imposition of that punishment in such a way that the poor suffer more than the rich is not related (and certainly not necessary) to the accomplishment of the state's objectives of deterrence, intimidation or rehabilitation of wrongdoers. Illinois has argued that § 1-7(k) is constitutional because it treats rich and poor alike. But in *Griffin v. Illinois*, supra, the Court struck down the requirement for payment of costs as applied to indigents, despite the fact that costs were required of both rich and poor alike. Justice Black observed:

> "But a law nondiscriminatory on its face may be grossly discriminatory in its operation. For example, this Court struck down the so-called "grandfather clause" of the Oklahoma Constitution as discriminatory against Negroes although that clause was by its terms nondiscriminatory. (citations)" (351 U.S. at 17, n.11)

Similarly, in *Harper* relying upon *Griffin v. Illinois, supra*, and *Douglas v. California, supra,*[22] the Court ruled that a

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[22] In *People v. Saffore*, 18 N.Y.2d 101, 271 N.Y.S.2d 972, 218 N.E.2d 686 (1966), the New York Court of Appeals held that to make "a defendant who has no money or property. . . serve out a fine at $1 per day, in addition to the maximum term of imprisonment," violated both a state statute and the state and federal constitutions.

The essence of the court's holding is that where the trial court knows that the defendant is unable to pay the fine, it cannot attempt to imprison a defendant when the sole purpose of imprisonment is to collect the fine. A defendant cannot be coerced into payment if he

state poll tax violated the Equal Protection Clause because the tax (which was non-discriminatory on its face) was an invidious discrimination against the poor.

That the state need not, indeed cannot, equalize every advantage possessed by rich defendants hardly compels the result reached in this case by the Supreme Court of Illinois. Permitting indigent defendants such as appellant to earn the amounts required by their fines does not in any realistic way sap what may be the state's limited financial resources. Alternate means of collection, such as installment payment or execution, are available. Thus, appellant's submission merely amounts to an acknowledgment that when liberty is at stake the state has an obligation to cure a drastic impact of poverty on the administration of the criminal law when it can do so. Cf. *People ex rel. Herring v. Woods*, 37 Ill.2d 435, 226 N.E.2d 594 (1967) (pre-trial detention credited in order that total imprisonment not exceed maximum).

This case does not involve the question dealt with in several cases, e.g., *United States ex rel. Privatera v. Kross*, 239 F.Supp. 118 (S.D.N.Y. 1965) aff'd 345 F.2d 533, (2nd Cir. 1965), cert. denied, 382 U.S. 911 (1965), as to whether an indigent is deprived of equal protection of the laws when subsequent to failure to pay a fine he is imprisoned for a period which does not exceed the maximum prison term possible for the substantive offense. While such imprisonment of any indigent for nonwilful failure to pay a fine raises a serious constitutional question, it might be argued that the resulting imprisonment is justifiable on grounds

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"has no money or property" with which to pay; therefore, the additional imprisonment in lieu of the fine can only have been intended as extra punishment, extending the punitive imprisonment beyond the statutory maximum. A unanimous court found that incarceration violated the excessive fine clause of the Eighth Amendment as well as the Equal Protection Clause because incarceration at $1.50 per day "notably exceeds in amount that which is reasonable, usual, proper and just." (218 N.E.2d at 688). Accord: *Sawyer v. District of Columbia*, 238 A.2d 314 (D.C.App. 1968).

other than indigency. . "The result may depend upon a particular combination of infinite variables peculiar to each individual trial." *North Carolina v. Pearce*, 395 U.S. 711, 722 (1969), see also § 1-7(g) Ill. Rev. Stat. 1967, ch. 38. Individualized sentencing, it might be contended, justifies a judicial classification which results in greater imprisonment being imposed on one who might satisfy the interests of the criminal law with a fine if he could pay it forthwith.

In the present case, however, Williams, could only be sentenced to more than a year in prison by reason of his indigency. Under Illinois law, no consideration of rehabilitation or community safety could accomplish the result reached of converting the $500 fine and $5 court costs into 101 additional days in prison. Indeed, Judge Weinfeld, the District Judge in *Privitera* recognized the distinction between that case and this:

> "...the issues raised by petitioner would be more starkly presented in Federal constitutional terms had he been sentenced, as some defendants have, to the maximum permissible jail term and fined $500, default to result in additional imprisonment of up to 400 days, or sentenced under a statute calling for a straight fine." (239 F.Supp. at 121)

Of course, one can seriously question the assumption that a period of imprisonment under an alternative fine-imprisonment sentence is generally among the class of sentences which are individualized unless trial judges inquire before pronouncing sentence, whether or not they are effectively giving a sentence of imprisonment or not. And coercion of a friend or relative to pay, while a possible *sub rosa* purpose, seems opposed to our fundamental understanding that no man should be penalized for the crimes of his friend or relative in which he himself did not participate. A defendant, moreover, should be entitled to "a fair hearing on the question of his ability to pay" and the judge should make "his decision with respect to the amount of the fine deliberately after such a hearing..." *Morris v. Schoonfeld*,

301 F.Supp. 158, 163 (D.Md. 1969), jurisdictional statement filed No. 782, October 28, 1969, 38 U.S.L. Week 3162.

But there is a fundamental difference between this case—in which only an indigent defendant is imprisoned for a period greater than that allowable by the statute which fixes the maximum penalty for the offense—and the case where the penalty of imprisonment imposed, though enhanced by failure to pay a fine, is nevertheless less than the maximum set by the legislature. In the former case the additional imprisonment responds to no valid objective of the criminal law, but rather to the defendants financial situation. In the latter, it is at least possible that the particular record may reveal circumstances which support the additional imprisonment. In short, a judge who sentences 30 days or 30 dollars may justifiably find that punishment, deterrence and intimidation require some immediate imposition of penalty of some sort greater than a future obligation to pay. His discretion to sentence certainly contemplates such judgments,[23] but conversion of indigency into jail time greater than that allowed for any other reason does not, by definition, respond to any particular judgment about a defendant or the needs of the criminal law. It is quite simply punishment for poverty.

CONCLUSION

The experience of appellant Williams is similar to that of countless other poor citizens who find themselves enmeshed in the criminal process. Arrested for a minor crime, he had already spent several weeks in jail when he came to trial because of his financial inability to make bail. Legal counsel being beyond his means, he was tried and convicted without

[23]The situation is not totally unlike *North Carolina v. Pearce*, where the Court held that increased sentencing upon reconviction must be based upon:

> "...events subsequent to the first trial that may have thrown new light upon the defendants 'life, health habits, conduct and mental and moral propensities.'" (395 U.S. at 723).

an attorney. Given the maximum sentence allowable for the offense with which he had been charged, he learned that he would have to spend several additional months in jail solely because he was too poor to pay the fine and the court costs imposed upon him.[24]

It is thus no accident that the National Advisory Commission on Civil Disorders has concluded:

> "Some of our courts. . .have lost the confidence of the poor. The belief is pervasive among ghetto residents that. . .from arrest to sentencing, the poor and uneducated are denied equal justice with the affluent, that procedures such as bail *and fines have been perverted to perpetuate class inequities.* We have found that the apparatus of justice in some areas has itself become a focus for distrust and hostility. Too often the courts have operated to aggravate rather than relieve the tensions that ignite and fire disorders." (Report of the Commission, p. 337 [Bantam, 1968]) (Emphasis added)

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[24]The problem of jailing indigents in lieu of fine has long affected large numbers of persons in this country. Thirty eight years ago the National Commission on Law Observance and Enforcement pointed out the inordinate number of offenders who were imprisoned for failure to pay fines. *Report on Penal Institutions, Probation and Parole*, 140-41 (1931). More recently, a study of the Philadelphia County jail showed that 60 percent of the inmates had been committed for nonpayment. In 1960, there were over 26,000 prisoners in New York City jails who had been imprisoned for default in payment of fines. The President's Commission on Law Enforcement and Administration of Justice, *Task Force Report; The Courts* 18, (1967). The Subin Report on the administration of justice in the District of Columbia found that out of a sample of 105 convicted defendants, 17 (or 16%) received a fine or imprisonment in default of payment sentence. Subin, *Criminal Justice in a Metropolitan Court*, pp. 88-89, (1966). The District of Columbia Crime Commission found in its study of 1183 persons sentenced, in the Court of General Sessions, 222 defendants (or 19%) were sentenced to a fine and to imprisonment in default of payment. Of these 105 persons could not pay the fine and were incarcerated. *Report of the President's Commission on Crime in the District of Columbia* 394, (1966).

A system which enforces the payment of fines by imprisonment predictably effects different treatment of defendants depending solely on whether they are with or without funds to pay the fine. Two persons convicted of identical offenses, under essentially similar circumstances and upon comparable records, and sentenced to pay the same fines, will walk out of court or be transported to jail depending entirely on how much money they have. A New York court put it this way:

> "[I]t would seem that an exception [to the practice of imprisonment for nonpayment of fine] must be made in the case of an indigent defendant, because such a defendant will not be able to pay the fine although detained in jail for that purpose, nor does he have within his control the power to limit the period that he thus stands committed. To hold otherwise would add one more disadvantage which the law will place upon the indigent defendant, and one more advantage which the law will give to the defendant with the money in his pocket to pay his fine, although the quality of their conduct has been the same and although their intention to pay the fine has been the same."[25]

In *Griffin v. Illinois*, 351 U.S. 12 (1956) this Court began to limit the range of permissible discrimination between rich and poor in criminal proceedings. The Court began with this premise:

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[25] *People v. Collins*, 47 Misc.2d 210, 261 N.Y.S.2d 970 (Orange County Ct. 1965). See also *People v. McMillan* 53 Misc.2d 685, 279 N.Y.S.2d 941 (Orange County Court, 1967) where the Court held that the sentencing of a defendant to jail in lieu of payment of a fine where the court knew that the defendant was indigent and had no money to pay the fine violated the principles of equal treatment under law. In so holding the court declared: "In these times in which all of the engines of the criminal law are driving towards preserving and defending the rights of the indigent, our local courts should avoid resort to an archaic system akin to imprisonment for debt." *Id.* at 943.

> "Both equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must so far as the law is concerned' " stand on equality before the bar of justice in every American court. (Id. at 12)

It concluded that:

> "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has." (Id. at 19)

To be sure this principle has its limits. For example, "A man of means may be able to afford the retention of an expensive, able counsel not within the reach of a poor man's purse." Id. at 23 (Mr. Justice Frankfurter, concurring). But when liberty is at stake, and certainly when alternatives are available to preserve legitimate state interests, the poor cannot be defined as a class worthy of greater punishment. In short, when a court deems it just that a defendant be punished for his crime by the payment of a fine, it cannot, through a strict system of imprisonment for failure to pay, erect a wall which prevents indigent persons from gaining their freedom while financially able defendants readily buy it.

For the foregoing reasons the judgment below should be reversed.

Respectfully submitted,

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